(19)

No. 98-6-CFX Title: El Paso Natural Gas Company, et al., Petitioners
v.
Laura Neztsosie, et al.

Docketed: June 29, 1998 Court: United States Court of Appeals for the Ninth Circuit

Entry	Date	Proceedings and Orders
	Jun 26 1998	Petition for writ of certiorari filed. (Response due September 11, 1998)
	Jul 14 1998	Order extending time to file response to petition until August 28, 1998.
	Aug 18 1998	Order further extending time to file response to petition until September 11, 1998.
	Sep 11 1998	Brief of respondents Laura Neztsosie, et al. in opposition filed.
	Sep 23 1998	DISTRIBUTED. October 9, 1998
	Sep 25 1998	Reply brief of petitioners El Paso Natural Gas Company, et al. filed.
	Oct 13 1998	Petition GRANTED. SET FOR ARGUMENT March 2, 1999. **********
	Nov 20 1998	Order extending time to file brief of petitioner on the merits until December 8, 1998.
	Nov 25 1998	Joint appendix filed.
	Dec 7 1998	Brief amicus curiae of American Nuclear Insurers filed.
	Dec 7 1998	Brief amicus curiae of Interstate Natural Gas Association of America filed.
	Dec 8 1998	Brief amici curiae of South Dakota, et al. filed.
	Dec 8 1998	Brief of petitioners El Paso Natural Gas, et al. filed.
	Dec 8 1998	Brief amicus curiae of Kerr-Mcgee Corporation filed.
	Dec 8 1998	Brief amicus curiae of United States filed.
	Dec 8 1998	Brief amicus curiae of Association of American Railroads filed.
	Dec 8 1998	Brief amicus curiae of Lewis County, Ohio filed.
	Dec 8 1998	Brief amicus curiae of National Mining Association filed.
	Dec 22 1998	Order extending time to file brief of respondent on the merits until January 14, 1999.
	Jan 14 1999	Brief of respondents Laura Neztsosie, et al. filed.
	Jan 14 1999	Brief amici curiae of Bertram Roberts and Hanni Roberts, et al. filed.
	Jan 14 1999	Brief amicus curiae of Fallen Paiute-Shoshone Tribe filed.
	Jan 14 1999	Motion of Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
	Jan 14 1999	CIRCULATED.
	Jan 14 1999	Brief amicus curiae of Navajo Nation filed.
	Jan 25 1999	Motion of Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
	Feb 1 1999	Letter from counsel for amicus Interstate Natural Gas Assn. received and distributed.
	Feb 16 1999	Reply brief of petitioners El Paso Natural Gas Company, et al. filed.

2 pp

No. 98-6-CFX

Entry	Date	Proceedings and Orders
	Feb 16 1999	LODGING consisting of twelve copies of tribal court proceeding submitted by counsel for the petitioner and distributed.
	Feb 24 1999	Record filed.
	Feb 26 1999	Record filed.
	Mar 2 1999	ARGUED.

SUPREME COURT, U.S.
FILED
JUN 26 1998
OFFICE OF THE CLERK

No. 97-

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

EL PASO NATURAL GAS COMPANY, A DELAWARE CORPORATION; CYPRUS FOOTE MINERAL COMPANY, A PENNSYLVANIA CORPORATION; AND CYPRUS AMAX MINERALS COMPANY, A DELAWARE CORPORATION,

PETITIONERS,

v.

LAURA NEZTSOSIE; ARLINDA NEZTSOSIE; AND ZONNIE MARIE DANDY RICHARDS, INDIVIDUALLY AND AS REPRESENTATIVE OF THE ESTATE OF HAROLD J. RICHARDS, SR.,

RESPONDENTS.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

Lynn H. Slade
Walter E. Stern
MODRALL, SPERLING, ROEHL, HARRIS & SISK, P.A.
500 Fourth Street, N.W.
NationsBank Tower, Suite 1000
Albuquerque, NM 87103
(505) 848-1800

Tom Galbraith
LEWIS & ROCA
40 North Central Avenue
Phoenix, AZ 85004-4429
(602) 262-5311

James R. Atwood*
Richard A. Meserve
COVINGTON & BURLING
1201 Pennsylvania Ave., N.W.
P.O. Box 7566
Washington, D.C., 20044-7566
(202) 662-6000

Attorneys for Petitioners

* Counsel of Record

QUESTIONS PRESENTED

1. Where non-Indians have been sued in tribal court solely under tribal-law causes of action that have been preempted by federal law, must those parties exhaust all tribal remedies before a federal court may consider the preemption issue?

2. Where a tribal court asserts adjudicatory jurisdiction against non-Indians involving a subject over which the tribe has no regulatory jurisdiction, must those parties exhaust all tribal remedies before seeking relief in federal court?

3. Did the court of appeals improperly reverse, *sua sponte*, an injunction from which the enjoined parties had not appealed?

PARTIES TO THE PROCEEDING

All the parties in the court of appeals are identified in the caption.

STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

El Paso Natural Gas Company has no parent companies. Its non-wholly owned subsidiaries include:

Aguaytia Energy L.L.C.
Bear Creek Storage Company
Berkshire Feedline Acquisition L.P.
Berkshire Power Company L.L.C.
Border Gas Inc.
CAPEX S.A.
Compania Samalayuca II, S.A. de C.V.
Companias Asociadas Petroleraos S.A.
Cornerstone/Merit Joint Venture
Coyote Gas Treating Limited Liability Company
Cross Country Development L.L.C.
ECK Generating s.r.o.
El Paso Amazonas Energia Ltda.
El Paso Energy Argentina Limitada S.A.
El Paso Pakistan Power (Private) Limited
EMA Power Kft.
Energeticke Centrum Kladno s.r.o.
Energy Equity EPIC (Sengkang) Pty. Limited
Epic Energy Pty. Limited
EPIC Energy Amazon Company
EPIC Gas Transportes S.A.
Fauji Kabirwala Power Company Limited
Garvin County Pipeline

Gas de Chile S.A.
Gasoducto Transandino Argentina S.A.
Gasoducto Transandino S.A.
Gasoductos de Chihuahua, S. de R.L. de C.V.
Interenergy Company
Latin America Capital L.L.C.
MASSPOWER
Matra Powerplant Holding B.V.
Metroplex Pipeline Company L.L.C.
Mountain Creek Joint Venture
Oasis Pipe Line Company
Oletha Partners
Orange Cogeneration GP II, Inc.
Orange Cogeneration Limited Partnership
Pasotronica, S.A. de C.V.
Polk Power GP II, Inc.
Polk Power Partners, L.P.
Portland Natural Gas Transmission System
PT Energi Sengkang
SAM II Equity Funding, L.L.C.
Samalayuca Holding Partnership
Samalayuca II Management L.L.C.
Samalayuca II Management, S. de R.L. de C.V.
Sulawesi Energy Pty. Limited
Tembec Company
The Maple Gas Development Corporation
The Western Market Center Joint Venture
Triunion Energy Company
Valley Pipeline L.L.C.
Viosca Knoll Gathering Company

Cyprus Foote Mineral Company has the following parents:

Cyprus Amax Minerals Company
Cyprus Metals Company
Cyprus Specialty Metals Company

Its non-wholly owned subsidiaries are:

Minera Cyprus Amax Chile Limitada
Minera Cyprus Chile Limitada
Sociedad Chilena de Litio Ltda.

Cyprus Amax Minerals Company has no parents. Its nonwholly owned subsidiaries are:

Cyprus Amax Kansanshi PLC
Cyprus Pima Mining Company
Cyprus Plateau Mining Corporation
Kinross Gold Corporation
Las Quintas Serenas Water Co.
Millennium Fuel Services, LLC
Oakbridge Pty Limited
PT Cyprus Amax Iriana
Rio Blanco Exploration, LLC
Sociedad Contractual Minera El Abra
Sociedad Minera Cerro Verde S.A.
Yankeetown Dock Corporation

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING ii

STATEMENT PURSUANT TO SUPREME COURT RULE 29.6 ii

TABLE OF CONTENTS v

TABLE OF AUTHORITIES vii

OPINIONS BELOW 1

JURISDICTION 1

STATUTES INVOLVED 1

STATEMENT 2

REASONS FOR GRANTING THE PETITION 6

I. Exhaustion Should Not Be Required Where a Tribal Cause of Action Has Been Preempted by Federal Law 7

II. The Ninth Circuit's Decision Undermines *Strate v. A-1 Contractors* by Requiring Exhaustion Notwithstanding the Absence of Both Tribal Regulatory Jurisdiction and Any Useful Purpose for Exhaustion 13

Page

III. The Ninth Circuit Had No Jurisdiction To Vacate an Injunctive Order From Which No Appeal Had Been Taken 16

CONCLUSION 18

Appendix A 1a

Appendix B 24a

Appendix C 27a

Appendix D 32a

Appendix E 34a

TABLE OF AUTHORITIES

Page

CASES

Blue Legs v. Bureau of Indian Affairs, 867 F.2d 1094 (8th Cir. 1989) 12

Bowen v. City of New York, 476 U.S. 467 (1986) . . . 14

Duke Power Co. v. Carolina Environmental Study Group, 438 U.S. 59 (1978) 9

Hawaii Housing Authority v. Midkiff, 467 U.S. 229 (1984) 15

In re TMI Litigation Cases Consolidated II, 940 F.2d 832 (3d Cir. 1991) 5,8,9,10

Iowa Mutual Insurance Co. v. LaPlante, 480 U.S. 9 (1987) 4,13,14,15

Kerr-McGee Corp. v. Farley, 115 F.3d 1498 (10th Cir.1997), *cert. denied*, 118 S. Ct. 880 (1998) 11,12

Mathews v. Eldrige, 424 U.S. 319 (1976) 14

McCarthy v. Madigan, 503 U.S. 140 (1992) 14

McKart v. United States, 395 U.S. 185 (1969) 14

Miller v. Butcher Distributors, 89 F.3d 265 (5th Cir. 1996) 16

Montana v. United States, 450 U.S. 544 (1981) . . . 6,13

Page

Morley Construction Co. v. Maryland Casualty Co., 300 U.S. 185 (1937) 16

National Farmers Union Insurance Cos. v. Crow Tribe of Indians, 471 U.S. 845 (1985) . . 4,13,14,15

Nieman v. NLO, Inc., 108 F.3d 1546 (6th Cir. 1997) 10

Northern States Power Co. v. Prairie Island Mdewakenton Sioux Indian Community, 991 F.2d 458 (8th Cir. 1993) 8,12

Northwest Airlines, Inc. v. County of Kent, Mich., 510 U.S. 355 (1994) 16

O'Conner v. Commonwealth Edison Co., 13 F.3d 1090 (7th Cir. 1994) 5,10

Pacific Gas & Electric Co. v. State Energy Resources Conservation & Devel. Commission, 461 U.S. 190 (1983) 8,9

Reservation Telegraph Cooperative v. Three Affiliated Tribes, 76 F.3d 181 (8th Cir. 1985) 12

Sherman v. Community Consolidated Sch. District 21, 980 F.2d 437 (7th Cir. 1992) 16

Silkwood v. Kerr-McGee Corp., 464 U.S. 238 (1984) . . 8

South Dakota v. Bourland, 508 U.S. 679 (1993) 8

Page

Stone v. City & County of San Francisco, 968 F.2d 850 (9th Cir. 1992) 17

Strate v. A-1 Contractors, 117 S. Ct. 1404 (1997) 5,7,13-15

Torres v. Oakland Scavenger Co., 487 U.S. 312 (1988) 17

United States v. Public Utilities Commission, 345 U.S. 295 (1953) 12

STATUTES AND RULES

Atomic Energy Act, as amended, 42 U.S.C. § § 2011, *et seq.* . . . . . *passim*

§ 2012 2
§ 2014 . . . . . 8, 9
§§ 2061-2064 8
§§ 2071-2078 8
§§ 2091-2099 8
§§ 2111-2114 8
§ 2210 10

Federal Power Act of 1935, 16 U.S.C. § 824 *et seq.* . 12

Federal Railroad Safety Act, 49 U.S.C. §§ 20101-20153 12

Federal Rules of Appellate Procedure 3 & 4 17

Hazardous Materials Transportation Act, 49 U.S.C. §§ 1801-1819 12

Page

ICC Termination Act, 49 U.S.C. § 10501(b)(2) 12

Price-Anderson Act, Pub. L. No. 85-256, 71 Stat. 576 (1957), as amended by the Price-Anderson Amendments Act of 1988, Pub. L. No. 100-408, 102 Stat. 1066 (1988) . . . . . *passim*

Resource Conservation and Recovery Act of 1976, 42 U.S.C. §§ 6901 *et seq.* 12

28 U.S.C. § 1254(1) 1

28 U.S.C. §§ 1331, 1332, 1337, & 2201 3

LEGISLATIVE MATERIALS

S. Rep. No. 100-218 (1987) 9-10

H.R. Rep. No. 100-104 8

El Paso Natural Gas Company ("El Paso"), Cyprus Foote Mineral Company, and Cyprus Amax Minerals Company (collectively "Cyprus") petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the court of appeals, as amended (App., *infra*, 1a-23a), is not yet reported. The order of the court of appeals amending its opinion, denying the petitions for rehearing en banc, and rejecting the suggestions for rehearing en banc (App., *infra*, 24a-26a) is also not yet reported. The decisions of the district court (App., *infra*, 27a-31a and 32a-33a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 11, 1998. Petitions for rehearing and suggestions for rehearing en banc were denied April 27, 1998. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The pertinent provisions of the Atomic Energy Act, as amended by the Price-Anderson Act and the Price-Anderson Amendments Act, 42 U.S.C. §§ 2012-2014, 2210, are set forth at App., *infra*, 34a-45a.

STATEMENT

1. In the Atomic Energy Act of 1954 ("AEA"), Congress found that the development and control of nuclear materials were "vital to the common defense" and that federal regulation of such materials would promote the "national interest." 42 U.S.C. § 2012(a) & (c). Accordingly, Congress established a pervasive federal regulatory program administered by the Atomic Energy Commission ("AEC") for all phases of the nuclear industry -- mining, processing, shipping, enriching, utilizing, and disposing of nuclear materials.[1] Moreover, to supplement the AEC's licensing and regulatory controls, the Price-Anderson Amendments Act of 1988 added an additional feature to the AEA: an exclusive federal-law adjudicatory framework to govern all claims of injury alleged to be caused by nuclear-related activities in the United States. *See* pages 8-10 *infra*.

2. From 1957 through 1968, El Paso Natural Gas Company ("El Paso") operated a uranium mine on land leased from the Navajo Nation and located on the tribe's reservation in northeastern Arizona.[2] El Paso operated the mine pursuant to federal regulation by, and under a license and contract with, the AEC. The AEC purchased all the mine's production under the government's Domestic Uranium Procurement Program.

In April 1995, almost thirty years after the El Paso mine had closed and its mining lease had been surrendered, Laura and Arlinda Neztsosie (the "Neztsosies") filed suit against El Paso in Navajo tribal court. The Neztsosies, members of the Navajo Nation, alleged that water in the vicinity of the

---

[1] The AEC's authority has since been transferred to the Nuclear Regulatory Commission and the Department of Energy.

[2] During much of this period, the mine was operated by a wholly-owned subsidiary of El Paso, but for convenience we refer only to the parent company.

El Paso mine had become contaminated by radioactive mine wastes and had caused them personal injury. The Neztsosies alleged only claims based on Navajo common law; they did not plead federal-law claims under the Price-Anderson Amendments Act.

Believing tribal jurisdiction to be precluded by federal law, El Paso filed a complaint for declaratory and injunctive relief in the United States District Court for the District of Arizona.[3] El Paso's complaint, and a subsequent motion for preliminary injunction, recited that the El Paso mine had been operated under pervasive AEC regulation and that the Price-Anderson Amendments Act had established the exclusive remedy for personal-injury claims arising out of nuclear-related activities. Thus, El Paso argued, the Neztsosies' tribal-law causes of action had been preempted by federal law, and the tribal court lacked subject matter jurisdiction.

The district court (Hon. Roger G. Strand) granted in part and denied in part El Paso's motion for an injunction. The court observed that "the United States has a very strong and compelling interest to assure that it operates its nuclear industry in all of its varying facets in a manner that is uniformly appropriate for all," but that the presence of tribal governments within the United States "compounds this problem" and results in a "mix of complexity." (App., *infra*, at 29a) In the district court's view, this complexity should be resolved by allowing the tribal court to hear the Neztsosies' claims based upon tribal law, but by enjoining the Neztsosies from asserting in tribal court any claims under Price-Anderson. The court declined to decide whether the tribal-law claims had been preempted by Price Anderson. (App., *infra*, at 30a)

Subsequently, in tribal court, the Navajo tribal judge denied El Paso's motion to dismiss the Neztsosies' complaint on the basis of federal preemption. The tribal court concluded

---

[3] Jurisdiction was based on 28 U.S.C. §§ 1331, 1332, 1337, and 2201.

that "the Price-Anderson Act has no application to this case" and that the Neztsosies' claims, based exclusively on tribal law, could proceed. Order Denying Defendant's Motions To Dismiss, No. TC-CV-0052-95, at 13 (D.C. Navajo Nation Judicial District of Tuba City, Arizona, Oct. 9, 1996).

3. For purposes of this petition, the suit involving Cyprus is functionally identical. Cyprus is the successor of the operator of a uranium mine on the Navajo reservation that had closed in the mid-1960s. Zonnie Richards, a member of the Navajo Nation, sued Cyprus in tribal court, individually and as representative of her husband's estate, alleging wrongful death and personal injuries as a result of radioactive contamination from the mine. Cyprus counter-sued in Arizona federal court, and the result was another partial injunction by District Judge Strand, similar to the El Paso partial injunction. (App., *infra*, at 32a-33a)

4. El Paso and Cyprus both appealed the district court's refusals to enjoin the tribal-law claims, and the appeals were consolidated. The Neztsosies and Ms. Richards did not cross-appeal from the district court's injunctions that precluded them from initiating any Price-Anderson claims in tribal court.

a. A divided panel of the Ninth Circuit affirmed the district court's refusal to enjoin prosecution of tribal-law claims and, *sua sponte*, reversed the injunctions against the assertion of Price-Anderson claims in tribal court. The panel majority (Judges Pregerson and Ferguson) concluded that, under *National Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845 (1985), and *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9 (1987), a non-Indian sued in tribal court must exhaust tribal remedies before seeking relief in federal court, save in very narrow circumstances. (App., *infra*, 5a-8a) Quoting a phrase of *National Farmers*, the court stated that the decisive issue was whether the Price-Anderson Amendments Act contained an "express jurisdictional prohibition" of tribal jurisdiction over nuclear-related claims. (*Id.* 7a) Without directly challenging the holdings of other Circuits that Price-Anderson provided an exclusive federal-law

remedy for nuclear-related claims, the court concluded that it need not reach the preemption issue because the Act did not provide for exclusive *jurisdiction* in the federal courts, observing that the statute contemplated the possibility that Price-Anderson claims could be litigated in State courts. (App., *infra*, 13a, citing 42 U.S.C. § 2210(n)(2)). This Court's recent decision in *Strate v. A-1 Contractors*, 117 S. Ct. 1404 (1997), which held that tribal exhaustion was not required with respect to matters over which a tribe plainly lacks regulatory jurisdiction and sovereign authority (*id.* at 1413 & 1416 n.14), was distinguished in a footnote as limited to torts arising on reservation lands that had been transferred to State control and opened to the public. (App., *infra*, 15a n.5)

As for the district court's injunction against assertion of Price-Anderson claims in tribal court, the Ninth Circuit majority noted that the Neztsosies and Ms. Richards had not appealed from that order and were asserting only claims "based on Navajo common law and . . . not implicat[ing] Price-Anderson." (App., *infra*, 9a) Nonetheless, the court of appeals *sua sponte* reversed the injunction, citing "important comity considerations" and its view that Price-Anderson contained no express prohibition on tribal jurisdiction. (*Id.*)

b. Judge Kleinfeld dissented. He recited the holdings of other Circuits that the Price-Anderson Amendments Act provided an exclusive federal-law remedy and preempted all other causes of action for nuclear-related torts. App., *infra*, 22a, citing *In re TMI Litig. Cases Consol. II*, 940 F.2d 832, 854 (3d Cir. 1991) ("A claim growing out of any nuclear incident is compensable under the terms of the [Price-Anderson] Act or *it is not compensable at all*." (emphasis in original)), and *O'Conner v. Commonwealth Edison Co.*, 13 F.3d 1090, 1099 (7th Cir. 1994) (same). Judge Kleinfeld thus concluded that the tribal members' "claims for injury and death resulting from nuclear materials left over from uranium mining were Price-Anderson claims or nothing . . . ." (App., *infra*, 21a)

It followed, Judge Kleinfeld reasoned, that the tribal court lacked jurisdiction over the tribal members' claims and that exhaustion was not required. Because the tribal members were limited to Price-Anderson remedies, had failed to appeal the district court's ruling that Price-Anderson claims could not be asserted in tribal court, and were asserting in tribal court only claims that had been preempted by federal law, "there are no claims that can be made in tribal court. There can be no claim for which exhaustion in tribal court can be required." (*Id.* at 22a)

REASONS FOR GRANTING THE PETITION

Lower courts are increasingly embroiled in disputes over the authority of Indian tribes to assert sovereign powers over non-members. Although a tribe's sovereignty over non-Indians is limited (*e.g.*, *Montana v. United States*, 450 U.S. 544, 565 (1981) (stating the "general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers")), the doctrine of exhaustion of tribal remedies can preclude timely federal-court relief from baseless claims of tribal jurisdiction. Non-Indians sued in tribal court may have to endure years of needless, expensive tribal-court litigation before obtaining a federal-court ruling on a dispositive question of the propriety of the tribe's jurisdiction. Indeed, the question of when tribal exhaustion is required has itself become a contentious, frequently litigated matter, to the detriment of Indian and non-Indian parties alike.

In the present case, the Ninth Circuit applied a rigid and mechanical exhaustion requirement and squandered the opportunity to set one clear benchmark: where federal law has preempted tribal causes of action, exhaustion of tribal judicial remedies should not be required. As four other Circuits have recognized, the Price-Anderson Amendments Act federalized the law of torts arising from nuclear-related activities, and preempted any causes of action not sanctioned by that Act. Exhaustion of preempted tribal remedies in such

cases serves no purpose other than to delay resolution of dispositive federal issues and to frustrate the policy of preemption. This issue is important not only in the context of nuclear torts but also in a variety of other areas where Congress has adopted pervasive regulatory regimes.

In ruling as it did, the Ninth Circuit also violated both the letter and spirit of this Court's most recent ruling on tribal exhaustion, *Strate v. A-1 Contractors*, 117 S. Ct. 1404 (1997). While any case can be confined to its facts, *Strate* must logically be understood as holding that exhaustion of tribal remedies is not required where it is plain at the outset that the tribe lacks substantive, regulatory authority with respect to the matter at issue. The Ninth Circuit's limitation of *Strate* to traffic accidents on State highways is unjustified and serves only to undermine this Court's efforts to inject a common-sense, functional analysis in the law of tribal exhaustion.

Finally, the Ninth Circuit's conclusion that "comity considerations" entitled it to assert jurisdiction over lower-court orders from which no appeal had been taken creates an unsettling new exception to what had previously been a clear and well-established rule of appellate jurisdiction.

I. Exhaustion Should Not Be Required Where a Tribal Cause of Action Has Been Preempted by Federal Law.

Where a tribal cause of action has been clearly preempted by federal law, tribal exhaustion makes no sense, imposes needless cost and delay (*see Strate*, 117 S. Ct. at 1416 n.14), and frustrates the federal interests served by preemption. If Congress adopts an exclusive federal-law remedy in order to ensure substantive and procedural consistency and the availability of a federal forum, a requirement of tribal exhaustion undermines the statutory purpose. Indeed, in such cases, exhaustion violates the logic underlying preemption: Because the federal preemption has rendered any tribal remedies a nullity, there is -- in fact -- nothing to exhaust.

Here, the preemption of tribal law is clear. Since enactment of the AEA in 1946, the federal government has

occupied the entire field of regulating health and safety aspects of nuclear energy, including the production and processing of uranium ore. 42 U.S.C. §§ 2014(e), (z), (aa), 2061-2064, 2071-2078, 2091-2099, 2111-2114. Without question, the federal government has "exclusive jurisdiction to license the transfer, delivery, receipt, acquisition, possession, and use of nuclear materials." *Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Devel. Comm'n*, 461 U.S. 190, 207 (1983). As the Court said in *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248 (1984), the federal government has "*exclusive* regulatory authority over the safety aspects of nuclear power." (Emphasis added.) Accordingly, tribal regulation of health and safety issues related to uranium activities is precluded by federal law.[4]

But even beyond this, Congress directly addressed the present issue when it took the additional step of federalizing all tort claims arising from nuclear activities. In response to Three Mile Island and the Court's 1984 ruling in *Silkwood*, *supra*, that State punitive damage claims had not been preempted by the AEA, Congress enacted the Price-Anderson Amendments Act of 1988, amending the AEA to create an exclusive federal-law remedy for nuclear-related torts. Pub. L. No. 100-408, § 11, 102 Stat. 1066, 1076. Congress' objective was "to effect uniformity, equity, and efficiency in the disposition" of claims arising from nuclear-related activities. *In re TMI Litig. Cases Consol. II*, 940 F.2d 832, 857 (3d Cir. 1991); *see* H.R. Rep. No. 100-104, pt. 1, at 18 (1987). The Price-Anderson Amendments thus furthered the

---

[4] *E.g.*, *South Dakota v. Bourland*, 508 U.S. 679, 690-91 (1993) (by authorizing State regulation and giving the Army Corps of Engineers regulatory control over certain reservation lands, Congress impliedly preempted tribe's jurisdiction to regulate nonmembers' hunting and fishing activities); *Northern States Power Co. v. Prairie Island Mdewakenton Sioux Indian Community*, 991 F.2d 458 (8th Cir. 1993) (tribal ordinance regulating transportation of hazardous materials was preempted by Hazardous Materials Transportation Act).

AEA's goal of providing legal consistency and assurances to both individuals and the business sector concerning the operation of nuclear-related facilities.[5]

In brief, the AEA as amended in 1988 defines "public liability" to mean "any legal liability arising out of or resulting from a nuclear incident" (42 U.S.C. § 2014(w)), and "nuclear incident" to mean any occurrence within the United States causing injury or damage "resulting from the radioactive, toxic, explosive, or other hazardous properties" of nuclear materials. *Id.* § 2014(q). The statute defines "public liability action" to mean "*any* suit asserting public liability" (*id.* § 2014(hh) (emphasis added)), and provides that all such "public liability actions" are to be *federal-law* causes of action.[6] Congress thus ensured that federal jurisdiction would exist for all such claims (*see* S. Rep. No. 100-218, at

---

[5] *See Pacific Gas & Elec.*, 461 U.S. at 207 (the AEA "grew out of Congress' determination that the national interest would be best served if the Government encouraged the private sector to become involved in the development of atomic energy for peaceful purposes under a program of federal regulation and licensing"); *Duke Power Co. v. Carolina Envtl. Study Group*, 438 U.S. 59, 64 (1978) (Price-Anderson Act of 1977 amended the AEA to address concerns that private firms might refuse to operate nuclear-related facilities "if their liability were not limited by appropriate legislation").

[6] A public liability action *shall be deemed to be an action arising under section 2210 of this title*, and the substantive rules for decision in such action shall be derived from the law of the State in which the nuclear incident involved occurs, unless such law is inconsistent with the provisions of such section.

Id. (emphasis added).

While a Price-Anderson claim borrows some elements from State law and thus "contains both federal and state elements," it is clearly a *federal* cause of action. *E.g.*, *In re TMI Cases*, 940 F.2d at 851-60 (claims under Price-Anderson are federal causes of action and thus properly within the federal courts' Article III jurisdiction of claims based on federal law).

13 (1987)), that a uniform federal standard of care would apply,[7] that related nuclear claims could be addressed in a coordinated fashion,[8] and -- with respect to tort claims subject to federal indemnification -- that special substantive rules would apply.[9]

Except for the Ninth Circuit, every Court of Appeals that has considered the issue has concluded that these Price-Anderson provisions establish an exclusive federal remedy for nuclear-related torts, preempting any other theories of liability. *See TMI*, *supra*, 940 F.2d at 854 ("A claim growing out of any nuclear incident is compensable under the terms of the Amendments Act or *it is not compensable at all*"; state-law claims preempted (emphasis in original)); *Nieman v. NLO, Inc.*, 108 F.3d 1546, 1553 (6th Cir. 1997) ("Nieman can sue under the Price-Anderson Act, as amended, or not at all"; state-law claims preempted); *O'Conner v. Commonwealth Edison Co.*, 13 F.3d 1090, 1099 (7th Cir. 1994) ("A claim growing out of any nuclear incident is compensable under the terms of the Amendments Act or it is not compensable at all";

---

[7] *See In re TMI Cases*, 940 F.2d at 854-60 (Price-Anderson Amendments require application of federal standard of care for nuclear facilities and preempt State standards).

[8] *See* 42 U.S.C. § 2210(n)(2) (defendant in a nuclear-related tort case may remove case from State to federal court); *id.* § 2210(n)(3) (chief judge of U.S. district court hearing nuclear-related claims may, upon making certain filings, appoint a special caseload management panel to coordinate cases); *id.* §§ 2210(h) & 2210(n)(2) (if nuclear-related claim is subject to federal indemnification, the Nuclear Regulatory Commission or Department of Energy may "take charge of [the] action" and obtain its removal from State to federal court).

[9] *E.g.*, 42 U.S.C. § 2210(e) (upper limit on aggregate liability); *id.* § 2210(n)(1) (mandating waiver of certain defenses); *id.* § 2210(s) (no punitive damages). As these provisions illustrate, some provisions of the Price-Anderson regime apply only to claims indemnified by the United States, whereas others apply to all "public liability actions." El Paso's and Cyprus' claims are not subject to federal indemnification.

state-law claims preempted). The Tenth Circuit, in the only other case to address whether Price-Anderson preempts tribal-law claims, likewise found preemption. *Kerr-McGee Corp. v. Farley*, 115 F.3d 1498, 1504 (10th Cir. 1997), *cert. denied*, 118 S. Ct. 880 (1998) ("The PAA [Price-Anderson Act] on its face provides the sole remedy for the torts alleged in this case [claims under tribal law]."). These conclusions clearly are correct, because Price-Anderson forecloses all claims for nuclear liability not expressly sanctioned by the Act and makes no exception for tribal law.[10]

The Ninth Circuit did not explicitly reject these holdings, for it purported to leave unresolved the question of preemption. *See* App., *infra*, 16a-17a. However, the court's rigid and mechanical analysis of tribal exhaustion wholly disregarded the important federal interests that caused Congress to adopt the Price-Anderson Amendments, and as a result the court required recourse to the very tribal claims and remedies that Congress abolished in 1988. By subjecting non-Indians to tribal-court proceedings without the protections of Price-Anderson, the Ninth Circuit has effectively rejected the preemption holdings of the other Circuits and imposed a tribal-exhaustion requirement at odds with both the logic and congressional intent of establishing an exclusive federal-law remedy. Non-Indians should not be subject to years of expensive tribal-court litigation before securing federal court answers to federal preemption questions that ultimately will be dispositive.

The relationship between federal preemption and the doctrine of tribal exhaustion is, of course, important beyond the Price-Anderson context. In many substantive areas,

---

[10] Inexplicably, though, the Tenth Circuit in *Farley* required exhaustion of the preempted tribal remedies. In that respect, the Tenth Circuit committed the same error as the Ninth Circuit below. But, on the underlying preemption issue, the Ninth and Tenth Circuits appear to be setting different standards for different parts of the Navajo reservation, which falls in both federal circuits.

including railroad safety and operations,[11] wholesale power transactions,[12] and transportation and disposal of hazardous materials,[13] Congress has adopted pervasive regulatory regimes that call for application of uniform federal standards, rather than varying local standards. When faced with claims of conflict between federal and tribal law in these areas, some courts of appeals have decided that preemption issues can be resolved without exhaustion of tribal remedies,[14] whereas others have required exhaustion.[15] Guidance from this Court is needed. Where, as here, it is plain that federal law has preempted tribal law and that Congress intended an exclusive

---

[11] Federal Railroad Safety Act, 49 U.S.C. §§ 20101-20153 (FRSA); ICC Termination Act, 49 U.S.C. § 10501(b)(2).

[12] Federal Power Act of 1935, 16 U.S.C. § 824 *et seq.*; *see United States v. Public Utilities Comm'n*, 345 U.S. 295 (1953).

[13] Resource Conservation and Recovery Act of 1976, 42 U.S.C. §§ 6901 *et seq.* (RCRA); Hazardous Materials Transportation Act, 49 U.S.C. §§ 1801-1819 (HMTA).

[14] For example, the Ninth Circuit's ruling here conflicts with *Northern States Power*, *supra*, where the Eighth Circuit held that a tribal ordinance requiring permitting for transportation of hazardous materials had been preempted by the HMTA. Consistent with that preemption holding, the court also held that tribal exhaustion was not required:

> The only [tribal] remedies are those created in the ordinance itself, and those remedies are void by virtue of the ordinance's preemption. This leaves NSP with nothing to exhaust.

991 F.2d at 463. *See also Blue Legs v. Bureau of Indian Affairs*, 867 F.2d 1094 (8th Cir. 1989) (RCRA preempts tribal authority over hazardous waste site; no exhaustion required).

[15] *E.g.*, *Reservation Tel. Coop. v. Three Affiliated Tribes*, 76 F.3d 181 (8th Cir. 1985) (telephone cooperatives must exhaust tribal remedies before raising federal preemption challenge to tribal tax on telephone rights-of-way); *Kerr-McGee v. Farley*, *supra* (nuclear-related tort).

federal-law remedy, requiring exhaustion of preempted tribal claims is the wrong result.

II. The Ninth Circuit's Decision Undermines *Strate v. A-1 Contractors* by Requiring Exhaustion Notwithstanding the Absence of Both Tribal Regulatory Jurisdiction and Any Useful Purpose for Exhaustion.

In *Strate v. A-1 Contractors*, 117 S. Ct. 1404 (1997), this Court clarified the law of tribal exhaustion. The Ninth Circuit's decision threatens to undermine much of what *Strate* sought to accomplish.

Strate contains three important teachings. First, the decision clarifies that the principle of tribal court exhaustion in *National Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845 (1985) and *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9 (1987), does not expand a tribe's jurisdiction over non-members beyond the limitations set forth in *Montana v. United States*, 450 U.S. 544 (1981). That is, *Montana*'s "general proposition" that a tribe's inherent sovereign powers "do not extend to the activities of nonmembers of the tribe" (450 U.S. at 565) is equally true for adjudicatory jurisdiction and for regulatory jurisdiction.

Second, the *Strate* Court unequivocally held that tribal court jurisdiction cannot exist where tribal regulatory jurisdiction is absent: "As to nonmembers, we hold, a tribe's adjudicative jurisdiction does not exceed its legislative jurisdiction." *Strate*, 117 S. Ct. at 1413. The Court thus clarified the oft-quoted passage in *Iowa Mutual* that, with respect to "the activities of non-Indians on reservation lands," civil jurisdiction "presumptively lies in the tribal courts" (480 U.S. at 18). What was meant, *Strate* explained, was the "unremarkable" proposition that a tribe may have adjudicatory jurisdiction "where tribes possess *authority to regulate* the activities of nonmembers." *Strate*, 117 S. Ct. at 1413 (emphasis added).

Third, *Strate* explained that tribal exhaustion was a principle "based on comity," "prudential" in nature, and "not

an unyielding requirement." *Id.* at 1411 n. 7 & 1413. Thus, unlike the approach taken by the Ninth Circuit, exhaustion should not be blindly required where it will serve no useful purpose. *National Farmers Union* and *Iowa Mutual* observed that development of a full record in tribal court may be desirable not simply as an exercise of courtesy, but because the tribal court's findings of fact and conclusions on tribal law may inform the federal court on the issue of tribal jurisdiction.[16] In *Strate*, the Court recognized the other side of the same coin: that it may be clear at the outset that the tribe lacks jurisdiction and that its "expertise" on tribal law is of no moment.

Thus, *Strate* held that, if it is "plain" that a tribe lacks jurisdiction over a nonmember's conduct, "it will be equally evident that tribal courts lack adjudicatory authority over disputes arising from such conduct." *Id.* at 1416 n.14. "Therefore, when tribal-court jurisdiction over an action such as this one is challenged in federal court, *the otherwise applicable exhaustion requirement must give way, for it would serve no purpose other than delay.*" *Id.* (internal citation omitted) (emphasis added).[17]

---

[16] *See National Farmers*, 471 U.S. at 856-57 (exhaustion in the tribal courts will give federal courts "the benefit of their expertise"); *Iowa Mutual*, 480 U.S. at 16 ("tribal courts are best qualified to interpret and apply tribal law").

[17] This functional analysis is consistent with the approach to exhaustion applied in other contexts, where the lower courts are to balance the interests in prompt access to a judicial forum with countervailing interests that may support exhaustion of other remedies. *E.g., McCarthy v. Madigan*, 503 U.S. 140, 144, 146, 147-48 (1992) (exhaustion not required where agency lacked power to grant petitioner the requested relief); *Bowen v. City of New York*, 476 U.S. 467, 484 (1986) ("application of the exhaustion doctrine is 'intensely practical'"), *quoting Mathews v. Eldrige*, 424 U.S. 319, 331 n.11 (1976); *McKart v. United States*, 395 U.S. 185, 198 (1969) (exhaustion not required where only issue was one of statutory construction that did not require agency expertise). Similarly, (continued...)

In its decision below, the Ninth Circuit undermined all these *Strate* teachings. It refused to apply a *Montana* analysis[18] or otherwise to consider whether the Navajo tribe possessed regulatory jurisdiction over the uranium mining activities of El Paso and Cyprus. Instead, noting that the alleged harms occurred within the reservation, the court inquired only as to whether the AEA or Price-Anderson contained an express statutory preclusion of tribal adjudicatory jurisdiction. *See National Farmers Union*, 471 U.S. at 856 n.21 (noting "express jurisdictional prohibitions" to be one legitimate ground not to require exhaustion). Finding none, it concluded mechanically that exhaustion was mandatory. Both AEA preemption of tribal regulatory jurisdiction and the Price-Anderson federalization of nuclear torts were brushed aside as irrelevant in the absence of an express statutory prohibition on tribal jurisdiction. App., *infra*, 15a-16a.

Further, the Ninth Circuit gave no weight to the fact that tribal court proceedings could not possibly result in findings of fact or conclusions on tribal law that would be useful to a federal court in deciding the critical issues of preemption and tribal jurisdiction. The arguments of El Paso and Cyprus that the AEA and Price-Anderson preempt tribal causes of action and thus bar jurisdiction over tribal-law claims present issues solely of federal law, not of fact and not of tribal law. There is nothing the tribal courts can say or do that will clarify or elucidate those issues. Exhaustion here "would serve no purpose other than delay." *Strate*, 117 S. Ct. at 1416 n.14.

By narrowly reading *Strate* and ignoring its key teachings, the Ninth Circuit injected unnecessary confusion, error, and

---

[17](...continued)
the rule in the analogous area of federal/State abstention (*Iowa Mutual*, 480 U.S. at 16 n.8) is that a federal court will not defer to State proceedings where issues of federal law are predominant. *E.g., Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229, 236 (1984).

[18] "Because this case is distinguishable from *Strate*, we need not consider whether a *Montana* exception applies." App., *infra*, 15a n.5.

uncertainty into the law of tribal exhaustion. To have coherence, the law of tribal exhaustion must be based on logical, understandable principles. One such principle must be that -- to impose its judicial powers upon non-members -- the tribe must have regulatory jurisdiction over the subject of the adjudication. Another must be that exhaustion is required only when it will help elucidate the question -- ultimately to be decided by a federal court -- whether the tribe's assertion of jurisdiction is proper under federal law. The Ninth Circuit's ruling does violence to these principles and leaves uncertain their legitimate role in future lower court adjudications.

III. The Ninth Circuit Had No Jurisdiction To Vacate an Injunctive Order From Which No Appeal Had Been Taken.

What we have said so far deals with the Ninth Circuit's substantive errors in requiring tribal exhaustion of preempted tribal-law claims. On that issue, at least the court of appeals had jurisdiction to rule as it did (wrong as its ruling was). As to a separate ruling, however, the Ninth Circuit compounded its substantive errors by acting outside its jurisdiction. It did so by concluding, contrary to the holdings of this Court and many other Circuits, that it had jurisdiction to vacate, for appellees' benefit, the district court's injunctions from which no appeal or cross-appeal had been filed.

Numerous cases have held that an appellee who fails to cross-appeal from a trial court order may not attack that order with a view to enlarging his or her rights or reducing the rights of the opposing party. *E.g.*, *Morley Constr. Co. v. Maryland Cas. Co.*, 300 U.S. 185, 191-93 (1937) (appellate court may not "give a new measure of relief" to appellee); *Miller v. Butcher Distribs.*, 89 F.3d 265, 267 (5th Cir. 1996); *Sherman v. Community Consol. Sch. Dist. 21*, 980 F.2d 437, 441 (7th Cir. 1992). Likewise, "[a] cross-petition is *required* . . . when the respondent seeks to alter the judgment below." *Northwest Airlines, Inc. v. County of Kent, Mich.*, 510 U.S.

355, 364 (1994) (emphasis added). *See also Torres v. Oakland Scavenger Co.*, 487 U.S. 312 (1988) (courts may not waive the jurisdictional requirements of Federal Rules of Appellate Procedure 3 and 4).

Nonetheless, citing "comity considerations" (App., *infra*, 9a), the Ninth Circuit *sua sponte* asserted jurisdiction to vacate and reverse preliminary injunctions issued by the district court that had directed the Neztsosies and Ms. Richards not to seek tribal-court relief under the Price-Anderson Act. The only authority that the Ninth Circuit cited for its assertion of jurisdiction dealt with the very different question of whether an appellate court was entitled to consider a new *legal argument*, not raised by the parties, to vacate an order that appellants had properly brought within the appellate court's jurisdiction.[19] Here, by contrast, the Ninth Circuit overturned an order against appellees which they had neither appealed nor cross-appealed. By starting down the road of finding "comity" exceptions to a previously well-established jurisdictional rule, the Ninth Circuit has created new confusion and uncertainty on a central question of appellate jurisdiction.

---

[19] *Stone v. City & County of San Francisco*, 968 F.2d 850, 855 (9th Cir. 1992) ("*Issues* touching on federalism and comity may be considered *sua sponte*.") (emphasis added) (App., *infra*, 9a).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Lynn H. Slade
Walter E. Stern
MODRALL, SPERLING
ROEHL, HARRIS &
SISK, P.A.
500 Fourth Street N.W.
Nations Bank Tower,
Suite 1000
Albuquerque, NM 87103
(505) 848-1800

Tom Galbraith
LEWIS & ROCA
40 North Central Avenue
Phoenix, AZ 85004
(602) 262-5311

James R. Atwood*
Richard A. Meserve
COVINGTON & BURLING
1201 Pennsylvania Ave. N.W.
P.O. Box 7566
Washington, D.C., 20044-7566
(202) 662-6000

Attorneys for Petitioners

* Counsel of Record

Dated: June 26, 1998

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

EL PASO NATURAL GAS COMPANY,
a Delaware Corporation,
Plaintiff-Appellant,

v.

LAURA NEZTSOSIE; ARLINDA NEZTSOSIE,
Defendants-Appellees.

No. 96-17121
DC No. CV-96-00049-RGS

CYPRUS FOOTE MINERAL COMPANY,
a Pennsylvania Corporation;
CYPRUS AMAX MINERAL COMPANY,
a Delaware Corporation,
Plaintiffs-Appellants,

v.

ZONNIE MARIE DANDY RICHARDS,
individually and as representative
of the Estate of Harold J.Richards, Sr.,
Defendant-Appellee.

No. 96-17139
DC No. CV-96-01524-RGS

Appeals from the United States District Court
for the District of Arizona

Filed February 11, 1998
Amended April 27, 1998

Before: Judges Harry Pregerson, Warren J. Ferguson, and Andrew J. Kleinfeld, Circuit Judges

Opinion by Judge Pregerson; Dissent by Judge Kleinfeld

OPINION

PREGERSON, Circuit Judge:

Members of the Navajo Nation (the "Navajo Court Plaintiffs") filed two separate actions in Navajo Tribal Court against corporations that conducted uranium mining operations on the Navajo Nation Reservation. The Navajo Court Plaintiffs alleged personal injury and wrongful death claims based on Navajo common law. In response to those actions, El Paso Natural Gas Company ("El Paso") and Cyprus Foote Mineral Company and Cyprus Amax Minerals Company (collectively "Cyprus") filed two separate suits in federal district court seeking preliminary injunctions to enjoin the Navajo Tribal Court from asserting jurisdiction over the Navajo Court Plaintiffs' claims. El Paso and Cyprus (collectively the "mining companies") alleged that all actions arising from "nuclear incidents" fall within the Price-Anderson Act, 42 U.S.C. § 2011 *et seq.*, and must be litigated in federal court.

The district court granted in part, and denied in part, the mining companies' requests for preliminary injunctions. The district court granted the preliminary injunctions to the extent the Navajo Court Plaintiffs alleged claims under Price-Anderson. The district court denied the preliminary injunctions, however, to the extent the Navajo Court Plaintiffs did not allege Price-Anderson claims. We have jurisdiction under 28 U.S.C. § 1292(a)(1). We affirm in part and reverse in part.

FACTS AND PRIOR PROCEEDINGS

The two actions filed by the Navajo Court Plaintiffs have been consolidated for this appeal. The facts and prior proceedings in each of these actions are as follows:

1. *Neztsosie v. El Paso*

Between 1956 and 1959, Rare Metals Corporation of America ("Rare Metals"), a now defunct subsidiary of El Paso, conducted uranium mining operations on the Navajo Nation Reservation. On March 29, 1995, Laura and Arlinda Neztsosie (the "Neztsosies"), members of the Navajo Nation, filed suit against Rare Metals in Navajo Tribal Court. The Neztsosies asserted claims for personal injuries arising from Rare Metals' uranium mining activities.

On January 5, 1996, El Paso filed suit against the Neztsosies in the United States District Court for the District of Arizona. El Paso sought a preliminary injunction enjoining the Neztsosies from prosecuting their claims in the Navajo Tribal Court. El Paso also sought a declaration that the Navajo Tribal Court had no jurisdiction over the Neztsosies's claims. El Paso asserted that the Neztsosies had to litigate their claims in federal court because their claims alleged liability arising from a "nuclear incident" under the Price-Anderson Act, 42 U.S.C. §§ 2014, 2210.

After a hearing, District Court Judge Robert G. Strand, entered an order denying in part, and granting in part, El Paso's request for a preliminary injunction. The district court denied El Paso's request for a preliminary injunction "to the extent that it in any way seeks to have this Court rule on any aspect of jurisdiction of the Navajo tribal court . . . except to the extent that [the Neztsosies] seek relief based upon the Price-Anderson Act in tribal court." In reaching its decision, the district court relied on "principles of tribal sovereignty" and the "tribal exhaustion doctrine." The district court stated,

however, that it did not determine whether Price-Anderson had any application to the claims asserted by the Neztsosies in Tribal Court.

2. *Richards v. Cyprus*

Cyprus Foote Mineral Company is the successor by merger to Vanadium Corporation of America ("VCA"). From the 1940's through the 1960's, VCA operated a uranium mine in Cane Valley, Arizona, known as Monument No. 2 mine. During the 1960's, VCA also constructed and operated a uranium concentrator at the Monument No. 2 mine site. The remnants of the ore concentrating process consisted of uranium tailings. The tailings produced by the concentrator were stored on a tailings pile on land adjacent to the Monument No. 2 mine site.

On April 20, 1995, Zonnie Marie Dandy Richards, a member of the Navajo Nation, filed suit individually, and as representative of her deceased husband's estate, against VCA and others in Navajo Tribal Court. Richards asserted claims for wrongful death and personal injuries arising from VCA's activities at the Monument No. 2 mine site.

On June 26, 1996, Cyprus filed suit against Richards in the United States District Court for the District of Arizona. Like El Paso, Cyprus sought a preliminary injunction enjoining Richards from prosecuting her claims in Navajo Tribal Court. Cyprus also sought a declaration that the Navajo Tribal Court had no jurisdiction over Richards's claims. Cyprus alleged that Richards had to litigate her claims in federal court because she alleged liability arising from a "nuclear incident" under Price-Anderson.

The Richards action, like the Neztsosie action, was assigned to District Court Judge Strand. The district court entered an order substantially similar to the order issued in the Neztsosie matter. The district court denied in part, and granted in part, Cyprus's request for a preliminary injunction.

El Paso and Cyprus timely appeal the district court's orders.

STANDARD OF REVIEW

We review de novo whether the district court was required to abstain from granting or denying an injunction when a party has failed to exhaust tribal court remedies. *Burlington N. R.R. v. Red Wolf*, 106 F.3d 868, 869-70 (9th Cir. 1997) (en banc).

I. The Tribal Exhaustion Requirement

The Supreme Court has stated that, subject to certain exceptions, comity principles require federal courts to either dismiss or abstain from deciding cases in which a party asserts that concurrent jurisdiction exists in an Indian tribal court. *Crawford v. Genuine Parts Co.*, 947 F.2d 1405, 1407 (9th Cir. 1991) (citing *National Farmers Un. Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845 (1985) and *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9 (1987)). "Considerations of comity require the exhaustion of tribal remedies before the [tribal court's jurisdiction] may be addressed by the district court." *Wellman v. Chevron USA, Inc.*, 815 F.2d 577, 578 (9th Cir. 1987). "The requirement of exhaustion of tribal remedies is not discretionary; it is mandatory." *Burlington N. R.R. v. Crow Tribal Council* ("*Crow Tribal Council*"), 940 F.2d 1239, 1245 (9th Cir. 1991). "Until petitioners have exhausted the remedies available to them in the Tribal Court system, it would be premature for a federal court to consider any relief." *National Farmers*, 471 U.S. at 857 (footnote omitted); *see also Yellowstone County v. Pease*, 96 F.3d 1169, 1171 (9th Cir. 1996), *cert. denied*, 117 S. Ct. 1691 (1997) ("[A] party *must* exhaust tribal court remedies before a federal district court may entertain a challenge to tribal jurisdiction.") (emphasis added); *Crow Tribal Council*, 940 F.2d at 1244

("[F]ederal courts should not even make a ruling on tribal court jurisdiction until tribal remedies are exhausted.") (citation omitted).

"[T]he initial determination of whether the Tribe has jurisdiction lies with the tribal court alone." *Crow Tribal Council,* 940 F.2d at 1244. "[N]on-Indian defendants *must exhaust tribal court* remedies before seeking relief in federal court, even where defendants allege that proceedings in tribal court exceed tribal sovereign jurisdiction." *Id.*

The tribal exhaustion requirement is based on considerations of comity and the long-standing policy of promoting tribal self-government and self-determination. *National Farmers,* 471 U.S. at 856. "[T]he federal policy supporting tribal self-government directs a federal court to stay its hand in order to give the tribal court a 'full opportunity to determine its own jurisdiction.'" *Iowa Mut.,* 480 U.S. at 16 (quoting *National Farmers,* 471 U.S. at 857).

The existence and extent of a tribal court's jurisdiction require a careful examination of tribal sovereignty. "[T]hat examination should be conducted in the first instance in the Tribal Court itself." *National Farmers,* 471 U.S. at 856. "[P]roper respect for tribal legal institutions requires that they be given a 'full opportunity' to consider the issues before them and 'to rectify errors.'" *Iowa Mut.,* 480 U.S. at 16 (citing *National Farmers,* 471 U.S. at 857).

While tribal exhaustion promotes tribal self-government and self-determination, it also promotes judicial efficiency:

> [T]he orderly administration of justice in the federal court will be served by allowing a full record to be developed in the Tribal Court before either the merits or any question concerning appropriate relief is addressed . . . . Exhaustion of tribal court remedies, moreover, will encourage tribal courts to explain to the parties the precise basis for accepting jurisdiction, and will also provide other courts with the benefit of

> their expertise in such matters in the event of further judicial review.

National Farmers, 471 U.S. at 856-57. "Congress is committed to a policy of supporting tribal self-government and self-determination. That policy favors a rule that will provide the forum whose jurisdiction is being challenged the first opportunity to evaluate the factual and legal bases for the challenge." *Id.* at 856.

In this case, the mining companies have not exhausted their tribal court remedies. Instead, the mining companies chose to file actions in federal district court seeking to enjoin the Navajo Tribal Court from asserting jurisdiction over the Navajo Court Plaintiffs' claims. *See Iowa Mut.,* 480 U.S. at 17 ("At a minimum, exhaustion of tribal remedies means that tribal appellate courts must have the opportunity to review the determinations of the lower tribal courts."). Thus, unless an exception to the tribal exhaustion requirement applies, the district court was obligated to abstain from ruling on the tribal court's jurisdiction over the Navajo Court Plaintiffs' common law claims.

An exception to the tribal exhaustion requirement exists where: (1) an assertion of tribal jurisdiction is motivated by a desire to harass or is conducted in bad faith; (2) tribal court jurisdiction patently would violate express jurisdictional prohibitions; (3) exhaustion would be futile because of the lack of an adequate opportunity to challenge the tribal court's jurisdiction; or (4) no federal grant authorizes tribal governance of nonmembers' conduct on land covered by *Montana*'s main rule. *See Strate v. A-1 Contractors*, ___ U.S. ___, 117 S. Ct. 1404, 1416 n.14 (1997); *National Farmers*, 471 U.S. 845 at 856 n.21. In this case, the parties only dispute the applicability of the "express jurisdictional prohibition" exception to tribal court jurisdiction. "A substantial showing must be made by the party seeking to invoke [the 'express jurisdictional prohibition'] exception to

the tribal exhaustion rule." *Kerr-McGee Corp. v. Farley ("Farley")*, 115 F.3d 1498, 1502 (10th Cir. 1997). "[T]ribal courts rarely lose the first opportunity to determine jurisdiction because of an 'express jurisdictional prohibition.' *Id.*

II. The District Court's Orders

In this case, the district court's orders appear to hold that Price-Anderson constitutes an express prohibition of tribal court jurisdiction. The district court denied the mining companies' requests for preliminary injunctions "except to the extent that [the Navajo Court Plaintiffs] seek relief based upon the Price-Anderson Act in tribal court." The district court also stated that it did not determine whether Price-Anderson had any application to the claims asserted by the Navajo Court Plaintiffs.

The mining companies have appealed that portion of the district court's orders that allow the Navajo Court Plaintiffs to pursue claims in Navajo Tribal Court other than Price-Anderson claims. The mining companies assert that the Navajo Court Plaintiffs are barred from pursuing any claims in Navajo Tribal Court because the Navajo Court Plaintiffs' claims arise from a nuclear tort and fall within the ambit of Price-Anderson.

The Navajo Court Plaintiffs, on the other hand, have not appealed the district court's rulings that Price-Anderson constitutes an express prohibition of tribal court jurisdiction. Rather, the Navajo Court Plaintiffs seek to affirm that portion of the district court's orders that allow them to pursue claims other than Price-Anderson claims in Navajo Tribal Court. The Navajo Court Plaintiffs contend that their claims are based on Navajo common law and do not implicate Price-Anderson.

It is unclear why the Navajo Court Plaintiffs have not appealed the district court's rulings that Price-Anderson constitutes an express jurisdictional prohibition that prevents

the Navajo Tribal Court from determining its jurisdiction over such claims. Nevertheless, because of the important comity considerations involved, we *sua sponte* examine whether Price-Anderson constitutes an express prohibition of tribal court jurisdiction. *See Stone v. City and County of San Francisco*, 968 F.2d 850, 855 (9th Cir. 1992) ("Issues touching on federalism and comity may be considered *sua sponte*.").[1]

As the following discussion demonstrates, we conclude that Price-Anderson does not contain an express jurisdictional prohibition barring the Navajo Tribal Court from determining its jurisdiction over the Navajo Court Plaintiffs' claims. Therefore the mining companies, before proceeding in federal court, are obligated to first exhaust their tribal court remedies.

---

[1]Our decision to review this issue *sua sponte* is further supported by: (1) the Tenth Circuit's recent decision in *Farley*, 115 F.3d at 1505, which expressly rejected the claim that Price-Anderson constitutes an express jurisdictional prohibition; and (2) the district court's misplaced reliance on *UNC Resources, Inc. v. Benally*, 518 F. Supp. 1046 (D. Ariz. 1981), in considering the tribal exhaustion doctrine.

In *Benally*, a corporation operating a uranium mill near the Navajo reservation brought an action in federal district court to enjoin several members of the Navajo Nation from proceeding in Navajo Tribal Court on civil actions alleging personal injuries and property damage arising from the corporation's activities. *Id.* at 1048. The district court concluded that the tribal court had no jurisdiction. *Benally* is not dispositive, however, because it was decided before the Supreme Court announced the tribal exhaustion doctrine in *National Farmers*. Moreover, the conduct at issue in Benally took place off the reservation, whereas in this case the alleged conduct took place on the Navajo Nation Reservation. Tribal jurisdiction applies more clearly to conduct occurring on reservation lands. *See Iowa Mut.*, 480 U.S. at 18 ("Tribal authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty.") (emphasis added); *Crawford*, 947 F.2d at 1408 ("When the dispute is a 'reservation affair' . . . there is no discretion not to defer.").

III. Price-Anderson

The mining companies assert that Price-Anderson and its legislative history mandate exclusive federal court jurisdiction for claims arising from "nuclear incidents." The mining companies also assert that we may infer an express jurisdictional prohibition. These contentions are not persuasive.

Before 1954, a federal monopoly existed over the use, control, and ownership of nuclear technology. *Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n,* 461 U.S. 190, 206 (1983). In 1954, however, Congress passed the Atomic Energy Act to encourage the private sector to become involved in the development of atomic energy under federal regulation. *Id.* at 206-07.

In 1957, Congress enacted Price-Anderson. Price-Anderson amended the Atomic Energy Act by creating specific protections for the nuclear industry from tort liability. *See Silkwood v. Kerr-McGee Corp.,* 464 U.S. 238, 251 (1984). Price-Anderson contains three distinct elements. First, it sets a ceiling on the aggregate damage award for nuclear tort claims that can be imposed against an entity involved in the use or handling of radioactive material. *In re TMI Litig. Cases Consol. II,* 940 F.2d 832, 852 (3d Cir. 1991). Second, it indemnifies any entity exposed to potential liability for activity resulting in a nuclear incident, even if the entity did not directly participate in the activity. *Id.* Third, Price-Anderson established an indemnification program through which the federal government would require entities involved in nuclear activities to obtain private insurance to a certain level, and then the federal government would pay all public liability claims above that liability ceiling. *Farley,* 115 F.3d at 1503.

Until amended in 1988, Price-Anderson's provisions regarding nuclear tort litigation did not apply unless and until the Nuclear Regulatory Commission ("NRC") determined that

an "extraordinary nuclear occurrence" had transpired. *O'Conner v. Commonwealth Edison Co.,* 13 F.3d 1090, 1095-96 (7th Cir. 1994). The 1988 amendments to Price-Anderson expanded its reach to include all "public liability actions" and eliminated the requirement that the NRC designate an extraordinary nuclear occurrence. 42 U.S.C. § 2210(n)(2). *See also* S. Rep. No. 218, 100th Cong., 1st Sess. 2, at 13 (1987) ("Any suit asserting public liability shall be deemed to be an action arising under the Price-Anderson Act."); H.R. Rep. No. 104, 100th Cong., 1st Sess., pt. 1 (same).

Price-Anderson states:

> With respect to any public liability action arising out of or resulting from a nuclear incident, the United States district court in the district where the nuclear incident takes place . . . shall have original jurisdiction without regard to the citizenship of any party or the amount in controversy. Upon motion of the defendant . . . any such action pending in any State court . . . or United States district court shall be removed or transferred to the United States district court having venue under this subsection.

42 U.S.C. § 2210(n)(2). Price-Anderson defines "public liability action" as "any suit asserting public liability." *Id.* § 2014(hh). "Public liability means any legal liability arising out of or resulting from a nuclear incident." *Id.* § 2014(w). A "nuclear incident means any occurrence . . . within the United States causing . . . bodily injury, sickness, disease, or death . . . arising out of or resulting from the radioactive,

toxic, explosive, or other hazardous properties of source,[2] special nuclear, or byproduct material."[3] *Id.* § 2014(q).

"Although the public liability cause of action is built around preexisting state law, it contains some distinctively federal elements as well." *O'Conner,* 13 F.3d at 1096; see also 42 U.S.C. § 2014(hh) ("The substantive rules for decision in [a public liability] action shall be derived from the law of the State in which the nuclear incident involved occurs, unless such law is inconsistent with the provisions of [42 U.S.C. § 2210]."). For example, Price-Anderson as amended in 1988 provides the limitations period for public liability actions, 42 U.S.C. § 2210(n)(1), provides for venue, *id.* § 2210(n)(2), limits the availability of punitive damages in an action arising out of an extraordinary nuclear occurrence, *id.* § 2210(s), and mandates the waiver of normally-available defenses in the case of extraordinary nuclear occurrences. *Id.* § 2210(n)(1).

IV. Price-Anderson does not Constitute an Express Jurisdictional Prohibition

One exception to the tribal exhaustion requirement calls for an *express* jurisdictional prohibition. *See National Farmers,* 471 U.S. at 857 n.21. This exception rarely applies. *See Farley,* 115 F.3d at 1502 (noting that a tribal court "rarely" loses the opportunity to determine its jurisdiction because of an express jurisdictional prohibition). "Civil jurisdiction over the activities of non-Indians on reservation lands 'presumptively lies in the tribal courts unless *affirmatively* limited by a specific treaty provision or federal

[2]"[S]ource material means (1) uranium, thorium, . . . or (2) ores containing one or more of the foregoing materials." 42 U.S.C. § 2014(z).

[3]"[B]yproduct material" includes "the tailings or wastes produced by the extraction or concentration of uranium or thorium from any ore processed primarily for its source material content." 42 U.S.C. § 2014(e).

statute.'" *Stock West, Inc. v. Confederated Tribes of the Colville Reservation,* 873 F.2d 1221, 1228 (9th Cir. 1989) (emphasis added) (quoting *Iowa Mut.,* 480 U.S. at 18).

Price-Anderson contains no such *express* prohibition of tribal court jurisdiction. Price-Anderson provides for *concurrent* rather than exclusive jurisdiction over claims arising from nuclear incidents. It merely grants defendants the *right*, rather than the obligation, to remove such cases to federal court. *See* 42 U.S.C. § 2210(n)(2) ("Upon motion of the defendant . . . any such action pending in any State court . . . shall be removed or transferred to the United States district court having venue under this subsection.").[4]

In *Farley*, the Tenth Circuit held that Price-Anderson does not constitute an express jurisdictional prohibition. In that case, certain members of the Navajo Nation filed an action in the Navajo Tribal Court against two mining companies. The mining companies had conducted operations on the Navajo Nation Reservation between 1952 and 1973. *Farley,* 115 F.3d at 1500. The plaintiffs alleged that the mining companies' mill released vast quantities of radioactive and toxic materials, which caused injuries. *Id.* The mining companies, without answering the tribal court complaint, filed an action in federal district court seeking to enjoin the suit from proceeding in the tribal court. *Id.* The mining

[4]The mining companies' reliance on *United States v. White Mountain Apache Tribe,* 784 F.2d 917 (9th Cir. 1986) and *United States v. Yakima Tribal Court,* 806 F.2d 853 (9th Cir. 1986) is misplaced. In *White Mountain*, we stated: "There is no point in requiring exhaustion . . . because tribal court jurisdiction is clearly foreclosed by the sovereign immunity of the United States." *White Mountain,* 784 F.2d at 920 n.10; *see also Yakima,* 806 F.2d at 861 (following *White Mountain*). Unlike *White Mountain* and *Yakima*, in this case, Navajo Tribal Court jurisdiction is not "clearly foreclosed" by Price-Anderson. Moreover, it is for the Navajo Tribal Court to first determine whether the Navajo Court Plaintiffs have even asserted Price-Anderson claims.

companies asserted that Price-Anderson constitutes an express jurisdictional prohibition of tribal court suits involving nuclear torts. Thus, they argued that they had no obligation to exhaust tribal court remedies. *Id.*

The district court disagreed and stated that the "Price-Anderson Act and its amendments are devoid of any mention of 'Indians,' 'tribes,' or 'tribal-court jurisdiction.'" *Kerr-McGee Corp. v. Farley,* 915 F. Supp. 273, 277 (D.N.M. 1995), *aff'd*, 115 F.3d 1498 (10th Cir. 1997). The district court further noted:

> The Price-Anderson Act does not affirmatively limit tribal court jurisdiction. Although Congress has plenary power to define the jurisdiction of tribal courts, it did not exercise that power, when it drafted the Price-Anderson Act. The Act makes no reference to Indians and nothing in the legislative history suggests any intent to render inoperative the established policy promoting tribal self-government.

915 F. Supp. at 280 (citation omitted).

The Tenth Circuit affirmed the district court's decision to stay all proceedings before it until the mining companies exhausted their tribal court remedies. The Tenth Circuit noted: "The 1988 amendments [to Price-Anderson] do not explicitly create *exclusive* federal court jurisdiction over nuclear incident litigation." *Farley,* 115 F.3d at 1504.[5]

---

[5]At oral argument, the mining companies contended that the Supreme Court's recent decision in *Strate* controlled this case. In *Strate*, the Supreme Court found that, absent a treaty or statute, an Indian tribe lacked jurisdiction over a dispute between nonmembers of the tribe when that dispute arose from an accident occurring on a state highway within the reservation. *Strate*, 117 S. Ct. at 1407-08. The Court noted that, when a tort occurs on alienated land, the tribal court will have jurisdiction over the

The mining companies contend that cases interpreting the 1988 Price-Anderson amendments recognize the Act's exclusivity. *See Nieman v. NLO, Inc.*, 108 F.3d 1546, 1553 (6th Cir. 1997) ("[A plaintiff] can sue under the Price-Anderson Act, as amended, or not at all."); *In re TMI Litig.*, 940 F.2d at 854 ("A claim growing out of any nuclear incident is compensable under the terms of the [1988

---

claim only where the tribe regulates one of two situations discussed in *Montana v. United States,* 450 U.S. 544, 67 L. Ed. 2d 493, 101 S. Ct. 1245 (1981): (1) consensual relationships between nonmembers and the tribe, or (2) conduct which "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Montana,* 450 U.S. at 566.

We find *Strate* inapposite to the facts of this case because the incident in *Strate* arose from a traffic accident on a state highway within the tribe's reservation. The *Strate* Court placed great emphasis on the fact that the state highway was open to the public and controlled and maintained by the state. *Strate,* 117 S. Ct. at 1414. Conversely, in this case the Navajo Nation retained tribal sovereignty over the land the mining companies occupied, which land was neither open to the public nor controlled or maintained by any entity other than the tribe. The *Strate* Court expressly declined to address cases, like the present one, where the disputed tort involved nonmembers of the tribe and occurred on tribal land. *See id.* at 1408 ("We express no view on the governing law or proper forum when an accident occurs *on a tribal road* within a reservation.") (emphasis added). Because this case is distinguishable from *Strate*, we need not consider whether a *Montana* exception applies. It seems indisputable, however, that a claim involving uranium contamination poses a danger to the 'health or welfare of the tribe.'

The dissent contends that *Burlington N. R.R. Co. v. Red Wolf,* 106 F.3d 868 (9th Cir. 1996), *vacated*, 1997 WL29189 (U.S. October 6, 1997) has expanded *Strate*, and that those two cases control the outcome here. In *Red Wolf*, we held that a railroad sued for a tort arising on a reservation must exhaust its tribal court remedies before a district court can exercise jurisdiction. The Supreme Court vacated our decision in *Red Wolf* and instructed us to reconsider our holding in light of *Strate*. But here, unlike in *Red Wolf*, there is no question that the Navajo Nation retained its sovereignty over the mine sites.

Amendments to the Act] or *it is not compensable at all.*"); *O'Conner,* 13 F.3d at 1099 ("The broad definition of 'public liability action' embodied in the Price-Anderson Act implies that Congress has exercised power under Article I and has enacted a new and independent, indeed exclusive, cause of action."). These cases are inapplicable, however, because they only address federal-state jurisdictional issues relating to Price-Anderson. They do not address Indian tribes or tribal sovereignty.

"Indian tribes occupy a unique status under our law." *National Farmers,* 471 U.S. at 851. "The condition of the Indians in relation to the United States is perhaps unlike that of any other two people in existence . . . . The relation of the Indians to the United States is marked by peculiar and cardinal distinctions which exist nowhere else." *Cherokee Nation v. Georgia,* 30 U.S. (5 Pet.) 1, 15-16 (1831).

Comity concerns differ between federal-state and federal-tribal jurisdiction:

> As in cases raising comity concerns regarding federal-state jurisdiction, comity concerns in federal-tribal jurisdiction arise out of mutual respect between sovereigns. In the realm of federal-tribal jurisdiction, however, Congress has expressed an additional interest in promoting the development of tribal sovereignty. The Supreme Court has recognized this congressional intent and assiduously advocated federal abstention in favor of tribal courts.

Smith v. Moffett, 947 F.2d 442, 445 (10th Cir. 1991). Thus, even if Price-Anderson preempts *state court* jurisdiction -- still an open question in this circuit -- there is no express prohibition of *tribal court jurisdiction*.

The Supreme Court has also recognized that comity concerns differ between federal-state and federal-tribal jurisdiction. In *Iowa Mut. Ins. Co. v. LaPlante*, the Supreme Court refused to infer that the diversity statute, 28 U.S.C. § 1332, divested tribal courts of jurisdiction in diversity actions. *Iowa Mut.*, 480 U.S. at 17-18. The Supreme Court stated that § 1332 "makes no reference to Indians and nothing in the legislative history suggests any intent to render inoperative the established federal policy promoting tribal self-government." *Id.* at 17.

The Supreme Court noted: "'Because the Tribe retains all inherent attributes of sovereignty that have not been divested by the Federal Government, the proper inference from silence . . . is that the sovereign power . . . remains intact.'" *Id.* at 18 (quoting *Merrion v. Jicarilla Apache Tribe,* 455 U.S. 130, 149 n.14 (1982)). Thus, the Court held that "in the absence of any indication that Congress intended [§ 1332] to limit the jurisdiction of the tribal courts, we decline . . . to hold that tribal sovereignty can be impaired in this fashion." *Id.*

We have also refused to infer a prohibition of tribal court jurisdiction absent express language in addressing 28 U.S.C. § 1355. *United States v. Plainbull,* 957 F.2d 724 (9th Cir. 1992). Section 1355 states: "The district courts shall have original jurisdiction, exclusive of the courts of the States" over certain actions brought by the federal government. 28 U.S.C. § 1335 (emphasis added). We noted that the plain language of § 1355 "only grants the district court original jurisdiction 'exclusive of the courts of the States,' not exclusive of all other courts that would otherwise have had jurisdiction. Since a tribal court is not a state court, we hold that it does not fall within the exclusive jurisdiction provision of section 1355." *Id.*

The mining companies rely on *Lower Brule Constr. Co. v. Sheesley's Plumbing & Heating Co.,* 84 B.R. 638 (D.S.D. 1988) in asserting that tribal jurisdiction can be

limited absent an express jurisdictional prohibition. This claim is also without merit. In *Brule*, the Tribal Housing Authority asserted that the tribal court had jurisdiction over a bankruptcy action. *Id.* at 640. The district court disagreed, however, and concluded that the tribal court's civil jurisdiction was "unlimited only in relation to matters of Indian self-government." *Id.* at 641. The district court reasoned that requiring tribal courts to perform as bankruptcy courts "would not promote self-government among the Indian tribes, even assuming that a body of 'bankruptcy' law existed in tribal court." *Id.* The court further noted: "The Bankruptcy Code makes no reference to Indians or tribal courts and there is no Congressional grant of authority for Indian tribal courts to assume jurisdiction over bankruptcy proceedings." *Id.* at 642.

Brule is of limited guidance in this case. First, we have already determined that an express jurisdictional prohibition is required to limit tribal court jurisdiction. See *Plainbull,* 957 F.2d at 726; *see also Farley,* 115 F.3d at 1505 ("Simply put, 'exclusive jurisdiction' is not conferred unless conferred explicitly."). Second, the tribe in Brule did not allege that it had a body of bankruptcy law which it could apply. In this case, however, the Navajo Court Plaintiffs have apparently asserted claims based on Navajo common law - an area clearly within the Navajo Tribal Court's expertise.[6]

Even if the issue were ambiguous, federal courts are "required to construe ambiguity in statutes on Indian affairs in favor of preserving Indian sovereignty." *Poodry v. Tonawanda Band of Seneca Indians,* 85 F.3d 874, 889 (2d Cir.), *cert. denied*, 117 S. Ct. 610 (1996). In this case,

---

[6]The mining companies also contend that Price-Anderson is the exclusive method for bringing nuclear tort claims because Price-Anderson provides a means of consolidating claims and ensuring a fair and equitable distribution of funds to all those affected by a nuclear incident. This claim is unavailing because it merely seeks to "infer" a jurisdictional prohibition where no "express" jurisdictional prohibition exists.

members of the Navajo Nation have alleged claims for personal injury and wrongful death arising from activity occurring on the Navajo Nation Reservation. Allowing the Navajo Tribal Court to determine its jurisdiction over these claims will preserve Indian sovereignty.

CONCLUSION

For the reasons stated above, we hold that Price-Anderson does not constitute an express jurisdictional prohibition that prevents the Navajo Tribal Court from determining its jurisdiction over the Navajo Court Plaintiffs' claims for personal injury and wrongful death arising from activities occurring on the Navajo Nation Reservation.[7] Accordingly, we reverse that portion of the district court's orders granting the mining companies' requests for preliminary injunctions. We affirm that portion of the district court's orders denying the mining companies' requests for preliminary injunctions.

Because the Navajo Tribal Court is to determine in the first instance whether it has jurisdiction over the Navajo Court Plaintiffs' claims, we remand this matter to the district court to either enter a stay of all proceedings or dismiss the complaint without prejudice pending the exhaustion of tribal court remedies. *See Iowa Mut.,* 480 U.S. at 20 n.14.

AFFIRMED in part, REVERSED in part, and REMANDED.

---

[7]In holding that Price-Anderson does not constitute an express jurisdictional prohibition, we need not consider the Navajo Court Plaintiffs' alternative claim that Price-Anderson does not apply because the mining companies had no indemnity agreement with the federal government. *See Silkwood,* 464 U.S. at 251-52 n.12 ("Government indemnification is available only to those required to maintain financial protection . . . and the liability limitation applies only to those who are indemnified.").

KLEINFELD, Circuit Judge, dissenting:

I respectfully dissent.

In these two lawsuits, three Navajo Indians sued El Paso Natural Gas Company, a Delaware corporation, and Cyprus Foote Mineral Company, a Pennsylvania corporation, in Navajo tribal court. The Richards case alleged death from cancer caused by radiation. The Neztsosies' case alleged that the Neztsosies and their cattle were poisoned by drinking water contaminated with radiation and heavy metals. The uranium mining occurred many years ago. In ruling on a motion for preliminary injunction, the district court ruled that tribal court proceedings were enjoined as to Price-Anderson claims, but not as to other claims, and did not rule on whether the Price-Anderson Act applied to claims asserted by plaintiffs in tribal court. Plaintiffs did not appeal the injunction against litigating Price-Anderson claims in tribal court, so it should be treated as law of the case. The corporations appealed denial of the preliminary injunction as to all claims not covered by Price-Anderson. The majority opinion lets the plaintiffs sue the corporations in tribal court on all their claims, Price-Anderson or not. That is incorrect.

The Price-Anderson Act, as originally enacted in 1957, did not create a federal tort cause of action, nor confer jurisdiction on the federal courts. *Kiick v. Metropolitan Edison Co.*, 784 F.2d 490, 493 (3d Cir. 1986); *Stibitz v. General Pub. Util. Corp.*, 746 F.2d 993, 997 (3d Cir. 1984). Congress amended the Act to expand federal jurisdiction to include claims arising from any "nuclear incident." *See O'Conner v. Commonwealth Edison Co.*, 13 F.3d 1090, 1096 (7th Cir. 1994).

The statute provides that federal district courts have original jurisdiction with respect to "any public liability action arising out of or resulting from a nuclear incident." 42 U.S.C. § 2210(n)(2). Cases brought in state courts "shall be

removed" to federal court. *Id.* "Public liability" in this statute means "any legal liability arising out of or resulting from a nuclear incident." 42 U.S.C. § 2014(w). A "nuclear incident" was defined as any occurrence arising out of the hazardous properties of nuclear materials that causes sickness, personal injury or death:

> any occurrence, including an extraordinary nuclear occurrence, within the United States causing, within or outside the United States, bodily injury, sickness, disease, or death, or loss of or damage to property, or loss of use of property, arising out of or resulting from the radioactive, toxic, explosive, or other hazardous properties of source, special nuclear, or byproduct material.

42 U.S.C. § 2014(q). I do not think there are any actions that can arise out of sickness or death resulting from the hazardous properties of nuclear material that are not Price-Anderson actions. That should be the end of the case, because the plaintiffs did not appeal the determination by the district court that Price-Anderson actions could not be asserted in tribal court.

Plaintiffs' claims for injury and death resulting from nuclear materials left over from uranium mining were Price-Anderson claims or nothing, and Price-Anderson claims must be brought in federal district court. Congress did not leave room for non-federal tribunals to interfere with nuclear development that Congress favored, or foster nuclear development it disfavored. Two circuits have held that the federal cause of action is exclusive. The Third Circuit stated:

> Congress clearly intended to supplant all possible state causes of action when the factual prerequisite of the statute are met . . . .

> Congress clearly considered the decisions of our court holding that Congress had not intended to create a federal cause of action for cases not based upon an extraordinary nuclear occurrence . . . . Congress then provided, in the [1988] Amendments Act, the clearest expression of intent that there be a federal cause of action arising directly under the Act.

In re TMI Cases Consolidated, 940 F.2d 832, 857 (3d Cir. 1991). The court concluded, "After the Amendments Act, no state cause of action based on public liability exists. A claim growing out of any nuclear incident is compensable under the terms of the Amendments Act or *it is not compensable at all.*" *Id.* at 854 (emphasis in original). In *O'Conner v. Commonwealth Edison Co.,* 13 F.3d 1090 (7th Cir. 1994), the Seventh Circuit similarly held: "A claim growing out of any nuclear incident is compensable under [Price-Anderson] or it is not compensable at all." *O'Conner,* 13 F.3d at 1099.

The majority should not have reached over the head of the parties to reverse on a matter not even raised, whether prosecution of Price-Anderson claims in tribal court should have been enjoined.

Because (1) it is law of the case, not appealed, that the tribal court lacks jurisdiction over Price-Anderson claims, and (2) there are no claims that can be made that are not Price-Anderson claims, it necessarily follows that (3) there are no claims that can be made in tribal court. There can be no claim for which exhaustion in tribal court can be required.

We made a somewhat similar exhaustion doctrine mistake in *Burlington Northern Railroad Co. v. Red Wolf,* 106 F.3d 868 (9th Cir.), vacated 118 S. Ct. 37, 139 L. Ed. 2d 5 (1997). The Supreme Court made short work of our error, vacating it in a memorandum decision for further consideration in light of *Strate v. A-1 Contractors,* 117 S. Ct. 1404 (1997). The Court held in *Strate,* 117 S. Ct. 1404

(1997), that exhaustion in tribal court is not required, where "it is plain that no federal grant of authority provides for tribal governance of nonmembers' conduct":

> When, as in this case, it is plain that no federal grant provides for tribal governance of nonmembers' conduct . . . covered by [*Montana v. United States,*' 450 U.S. 544 (1981)] main rule, it will be equally evident that tribal courts lack adjudicatory authority over disputes arising from such conduct. As in criminal proceedings, state or federal courts will be the only forums competent to adjudicate those claims. Therefore, when tribal-court jurisdiction over an action such as this one is challenged in federal court, the otherwise applicable exhaustion requirement, must give way, for it would serve no purpose other than delay.

Id. 1416 n.14. The majority has in footnote 5 attempted to limit *Strate* to its facts, as we might with a poorly reasoned decision of our own that had not stood up well over time. We cannot do that with a Supreme Court decision.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

EL PASO NATURAL GAS COMPANY,
a Delaware Corporation,
Plaintiff-Appellant,
v.

LAURA NEZTSOSIE; ARLINDA NEZTSOSIE,
Defendants-Appellees.

No. 96-17121
DC No. CV-96-00049-RGS

CYPRUS FOOTE MINERAL COMPANY,
a Pennsylvania Corporation;
CYPRUS AMAX MINERAL COMPANY,
a Delaware Corporation,
Plaintiffs-Appellants,
v.

ZONNIE MARIE DANDY RICHARDS,
individually and as representative
of the Estate of Harold J.Richards, Sr.,
Defendant-Appellee.

No. 96-17139
DC No. CV-96-01524-RGS

Appeals from the United States District Court
for the District of Arizona

April 27, 1998

Before: Judges Harry Pregerson, Warren J. Ferguson, and Andrew J. Kleinfeld, Circuit Judges

ORDER AMENDING OPINION AND DENYING PETITION FOR REHEARING EN BANC

The opinion filed on February 11, 1998 is amended as follows:

At Slip. Op. p. 1284, first full paragraph, lines 3-8:

Replace

"(2) tribal court jurisdiction "is patently violative of express jurisdictional prohibitions"; or (3) exhaustion would be futile because of the lack of an adequate opportunity to challenge the tribalcourt's jurisdiction. *National Farmers*, 471 U.S. 845 at 857 n.21 (emphasis added)."

with

"(2) tribal court jurisdiction patently would violate express jurisdictional prohibitions; (3) exhaustion would be futile because of the lack of an adequate opportunity to challenge the tribal court's jurisdiction; or (4) no federal grant authorizes tribal governance of nonmembers' conduct on land covered by Montana's main rule. *See Strate v. A-1 Contractors*, U.S. , 117 S. Ct. 1404, 1416 n.14 (1997); *National Farmers*, 471 U.S. at 856 n.21."

At Slip Op. p. 1291, n.5, first full paragraph, lines 2-3:

Replace

"*Strate v. A-1 Contractors*, U.S. , 117 S. Ct. 1404 (1997)"

with

"*Strate*"

At Slip Op. p. 1291, n.5, first full paragraph, line 7:

Replace

"*Id.* at 1407-08."

with

"*Strate*, 117 S. Ct. at 1407-08."

With these amendments, Judges Pregerson and Ferguson voted to deny the petition for rehearing, Judge Pregerson voted to reject the suggestion for rehearing en banc and Judge Ferguson so recommends. Judge Kleinfeld voted to grant the petition for rehearing and to accept the suggestion for rehearing en banc.

The full court has been advised of the en banc suggestion and no judge has requested a vote on it.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

No. CIV 96-0049-PCT-RGS

EL PASO NATURAL GAS COMPANY, a Delaware Corporation,
Plaintiff,

v.

LAURA NEZTSOSIE and ARLINDA NEZTSOSIE,
Defendants.

Order Denying Plaintiff's Request for Preliminary Injunction and Granting Limited Injunction

---

Transcript of Proceedings
May, 28, 1996

THE COURT: The plaintiff's application for preliminary injunction is denied to the extent that it in any way seeks to have this Court declare any aspect the jurisdiction of the Navajo tribal court. There is -- there is a set of differing views as to what this lawsuit involves. And when I say "this lawsuit," I mean the lawsuit brought by the defendants here as plaintiffs against El Paso Natural Gas in the tribal court.

The Navajo tribal court may or may not be presented with the issue of whether or not it has jurisdiction over all aspects of this case, that is to say this case should it include claims under the Price-Anderson Act as well as simply claims of negligence and other bases for a tort claim.

The Court does grant El Paso Natural Gas Company's requested relief to the extent that it enjoins the named defendants here, plaintiffs in the tribal court, from pursuing a Price-Anderson Act complaint in tribal Court. The Court's rationale for granting that limited aspect of the relief is application of the *National Farmer*'s three-factor test to the issues involved plus a consideration of the holdings in the case decided in this District Court in 1981, UNC Resources versus Benally.

In citing that case, I recognize that there are significant variations in the contacts, but taking the relevant analysis, the Court does that in supporting its limited grant of relief to the El Paso Natural Gas Company here by way of the preliminary injunction granted.

Now, I want it clear to the parties as to what is granted here and what is not granted here, and what the parties can and can't do in tribal court. The parties are enjoined from pursuing, as I said earlier, a cause of action in tribal court based upon the Price-Anderson Act for the reasons stated.

If the plaintiffs in that court want to, in effect, test the extent to which the Navajo tribal court believes it has jurisdiction, presumably it might be able to seek declaratory relief in that court from the tribal court as to its opinions as to its -- extent of its jurisdiction. And that is consistent with the Court's disinclination to in any way impede the jurisdiction of the tribal court in exploring its powers.

It is a case of importance in the sense that there's no doubt but what the operation of a facility on the -- on tribal lands that may affect a broad segment of tribal population from a health standpoint or otherwise is a matter of dramatic and significant concern to the tribe and to its government.

It is, of course, also true that the United States has a very strong and compelling interest to assure that it operates its nuclear industry in all of its varying facets in a manner that is uniformly appropriate for all who are exposed to both its benefits and its burdens. And because of the uniqueness of the geographic location of the sovereign tribal governments within the boundaries of the United States, it compounds this problem and, of course, also in part of that mix of complexity is the power, burden and responsibility of Congress to enact laws concerning the sovereign Indian nations within the United States.

It is the Court's belief that its ruling in this area preserves tribal sovereignty in its fullest measure, but at the same time recognizes the interests that have been argued concerning the nuclear industry, for lack of a better word, within the United States.

It's hoped that this will enable the parties to clarify the issue within the tribal court of its jurisdiction. It may be that it will conclude that on this narrow area it lacks jurisdiction or defers jurisdiction or is otherwise willing to permit claims to be adjudicated not in its own forum, or it may feel that clearly it does have it and if that's true, why then presumably there will be opportunities to test that decision within its own legal structure and there may be other occasions upon which that can be tested as well and in the United States District Court or in other courts.

I hope I've helped to clear and not muddy the waters that have been brought to me by this litigation.

Order

STRAND, Judge:

On May 28, 1996, plaintiff El Paso Natural Gas Company's application for a preliminary injunction of all tribal proceedings in the case of *Neztsosie v. El Paso Natural Gas Company*, Court of the Navajo Nation, District of Tuba City, Case No. TC-CV-0052-95, came on for hearing. After considering the parties' written motions, their supporting memoranda, and oral argument of counsel both at the hearing on May 28, 1996, and at a telephonic hearing regarding the wording of this order on July 11, 1996, this Court makes the following ruling pursuant to Federal Rule of Civil Procedure 65(d):

Plaintiff El Paso Natural Gas Company's Application for Preliminary Injunction is denied to the extent that it in any way seeks to have this Court rule on any aspect of jurisdiction of the Navajo tribal court. This Court denies El Paso Natural Gas Company's request for an injunction of tribal proceedings in *Neztsosie v. El Paso Natural Gas Company*, except to the extent that Laura and Arlinda Neztsosie seek relief based upon the Price-Anderson Act in tribal court. In all other respects, the relief sought by the plaintiff in its application for preliminary injunction is denied.

In reaching this decision, this Court relies on the principles of tribal sovereignty, the tribal exhaustion doctrine, the factors set forth in *National Farmers Union Ins. Co. v. Crow Tribe of Indians*, 471 U.S. 845 (1985), *UNC Resources, Inc. v. Benally*, 518 F.Supp. 1046 (D. Ariz. 1981), and on arguments and authorities presented by the parties in their papers and oral argument. In reaching this decision, the Court does not determine whether or not the provisions of the Price-Anderson Act have any application to the claims asserted by Laura and Arlinda Neztsosie in tribal court. It is further

ORDERED, approving cash bond in the amount of ONE THOUSAND and 00/100 DOLLARS ($1,000.00) in support of this injunction pursuant to Federal Rule of Civil Procedure 65(c).

SO ORDERED on this 3rd day of November, 1996.

Hon. Roger G. Strand
Judge of the United States District Court

APPENDIX D

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

No. CIV 96-01524-PCT-RGS

CYPRUS FOOTE MINERALS COMPANY,
a Pennsylvania Corporation, et al.,
Plaintiffs,

v.

ZONNIE MARIE DANDY RICHARDS,
individually and as representative of
the Estate of Harold J. Richards, Sr.,
Defendant.

Order

Plaintiff has filed this action seeking an order enjoining Defendant from pursuing the lawsuit of *Zonnie Marie Dandy Richards (The State of Harold J. Richards, Sr., Deceased) v. Texas Zinc, et al.*, which is pending in the District Court of the Navajo Nation, Kayenta District, No. KY-CV-002-95. Plaintiffs have filed an application for preliminary injunctive relief. After considering the parties' pleadings, the Court makes the following ruling:

Plaintiffs' application for a preliminary injunction is denied to the extent that it seeks to have this Court decide whether the Navajo tribal court has jurisdiction over the case before it. Further, Plaintiffs' request for an injunction of the

tribal proceeding in *Zonnie Marie Dandy Richards (The State of Harold J. Richards, Sr., Deceased) v. Texas Zinc, et al.* is denied except to the extent that Defendant seeks relief under the Price-Anderson Act in tribal court.

The Court bases its decision on the principles of tribal sovereignty, the tribal exhaustion doctrine, the factors set forth in *National Farmers Union Ins. Co. v. Crow Tribe of Indians*, 471 U.S. 845 (1985), *UNC Resources, Inc. v. Benally*, 518 F. Supp. 1046 (D. Ariz. 1981), and the additional authorities cited by the parties in their pleadings.

In reaching this decision, the Court does not determine whether or not the provisions of the Price-Anderson Act have any application to the claims asserted by Defendant in tribal court.

Accordingly,

IT IS ORDERED granting in part and denying in part Plaintiffs' Application for Preliminary Injunction (doc. #2).

FURTHER ORDERED approving a cash bond in the amount of ONE THOUSAND DOLLARS ($1000.00) in support of this injunction pursuant to Federal Rule of Civil Procedure 65(c).

DATED this 21st day of NOVEMBER, 1996.

[signed]

HONORABLE ROGER G. STRAND
U.S. DISTRICT COURT JUDGE

APPENDIX E

The Atomic Energy Act, as amended by the Price-Anderson Act and the Price-Anderson Amendments Act, 42 U.S.C., provides in relevant part:

§ 2012. Congressional findings

The Congress of the United States makes the following findings concerning the development, use, and control of atomic energy:

(a) The development, utilization, and control of atomic energy for military and for all other purposes are vital to the common defense and security.

. . .

(c) The processing and utilization of source, byproduct, and special nuclear material affect interstate and foreign commerce and must be regulated in the national interest.

(d) The processing and utilization of source, byproduct, and special nuclear material must be regulated in the national interest and in order to provide for the common defense and security and to protect the health and safety of the public.

(e) Source and special nuclear material, production facilities, and utilization facilities are affected with the public interest, and regulation by the United States of the production and utilization of atomic energy and of the facilities used in connection therewith is necessary in the national interest to

assure the common defense and security and to protect the health and safety of the public.

(f) The necessity for protection against possible interstate damage occurring from the operation of facilities for the production or utilization of source or special nuclear material places the operation of those facilities in interstate commerce for the purposes of this chapter.

(g) Funds of the United States may be provided for the development and use of atomic energy under conditions which will provide for the common defense and security and promote the general welfare.

. . .

(i) In order to protect the public and to encourage the development of the atomic energy industry, in the interest of the general welfare and of the common defense and security, the United States may make funds available for a portion of the damages suffered by the public from nuclear incidents, and may limit the liability of those persons liable for such losses.

§ 2013. Purpose of chapter

It is the purpose of this chapter to effectuate the policies set forth above by providing for —

(a) a program of conducting, assisting, and fostering research and development in order to encourage maximum scientific and industrial progress;

(b) a program for the dissemination of unclassified scientific and technical information and for the control, dissemination, and declassification of Restricted Data, subject

to appropriate safeguards, so as to encourage scientific and industrial progress;

(c) a program for Government control of the possession, use, and production of atomic energy and special nuclear material, whether owned by the Government or others, so directed as to make the maximum contribution to the common defense and security and the national welfare, and to provide continued assurance of the Government's ability to ~~enter~~ into and enforce agreements with nations or groups of nations for the control of special nuclear materials and atomic weapons;

(d) a program to encourage widespread participation in the development and utilization of atomic energy for peaceful purposes to the maximum extent consistent with the common defense and security and with the health and safety of the public;

(e) a program of international cooperation to promote the common defense and security and to make available to cooperating nations the benefits of peaceful applications of atomic energy as widely as expanding technology and considerations of the common defense and security will permit; and

(f) a program of administration which will be consistent with the foregoing policies and programs, with international arrangements, and with agreements for cooperation, which will enable the Congress to be currently informed so as to take further legislative action as may be appropriate.

§ 2014. Definitions

The intent of Congress in the definitions as given in this section should be construed from the words or phrases used in the definitions. As used in this chapter:

. . .

(q) The term "nuclear incident" means any occurrence, including an extraordinary nuclear occurrence, within the United States causing, within or outside the United States, bodily injury, sickness, disease, or death, or loss of or damage to property, or loss of use of property, arising out of or resulting from the radioactive, toxic, explosive, or other hazardous properties of source, special nuclear, or byproduct material . . . .

. . .

(w) The term "public liability" means any legal liability arising out of or resulting from a nuclear incident or precautionary evacuation (including all reasonable additional costs incurred by a State, or a political subdivision of a State, in the course of responding to a nuclear incident or a precautionary evacuation), except: (i) claims under State or Federal workmen's compensation acts of employees of persons indemnified who are employed at the site of and in connection with the activity where the nuclear incident occurs; (ii) claims arising out of an act of war; and (iii) whenever used in subsections (a), (c), and (k) of section 2210 of this title, claims for loss of, or damage to, or loss of use of property which is located at the site of and used in connection with the licensed activity, where the nuclear incident occurs. . . .

. . .

(hh) The term "public liability action", as used in section 2210 of this title, means any suit asserting public liability. A public liability action shall be deemed to be an action arising under section 2210 of this title, and the substantive rules for decision in such action shall be derived from the law of the State in which the nuclear incident involved occurs, unless such law is inconsistent with the provisions of such section.

. . .

§ 2210. Indemnification and limitation of liability

. . .

(e) Limitation on aggregate public liability

(1) The aggregate public liability for a single nuclear incident of persons indemnified, including such legal costs as are authorized to be paid under subsection o.(1)(D), shall not exceed -

(A) in the case of facilities designed for producing substantial amounts of electricity and having a rated capacity of 100,000 electrical kilowatts or more, the maximum amount of financial protection required of such facilities under subsection b. (plus any surcharge assessed under subsection o.(1)(E));

(B) in the case of contractors with whom the Secretary has entered into an agreement of indemnification under subsection d., the maximum amount of financial protection required under subsection b. or the amount of indemnity and financial protection that may be required under paragraph (3) of subsection d., whichever amount is more; and

(C) in the case of all licensees of the Commission required to maintain financial protection under this section -

(i) $500,000,000, together with the amount of financial protection required of the licensee; or

(ii) if the amount of financial protection required of the licensee exceeds $60,000,000, $560,000,000 or the amount of financial protection required of the licensee, whichever amount is more.

(2) In the event of a nuclear incident involving damages in excess of the amount of aggregate public liability under paragraph (1), the Congress will thoroughly review the particular incident in accordance with the procedures set forth in section 170 i. and will in accordance with such procedures, take whatever action is determined to be necessary (including approval of appropriate compensation plans and appropriation of funds) to provide full and prompt compensation to the public for all public liability claims resulting from a disaster of such magnitude.

(3) No provision of paragraph (1) may be construed to preclude the Congress from enacting a revenue measure, applicable to licensees of the Commission required to maintain financial protection pursuant to section b., to fund any action undertaken pursuant to paragraph (2).

(4) With respect to any nuclear incident occurring outside of the United States to which an agreement of indemnification entered into under the provisions of subsection d. is applicable, such aggregate public liability shall not

exceed the amount of $100,000,000, together with the amount of financial protection required of the contractor.

. . .

(h) Conditions of agreements of indemnification

The agreement of indemnification may contain such terms as the [Nuclear Regulatory] Commission or the Secretary [of Energy], as appropriate, deems appropriate to carry out the purposes of this section. Such agreement shall provide that, when the Commission or the Secretary, as appropriate, makes a determination that the United States will probably be required to make indemnity payments under this section, the Commission or the Secretary, as appropriate, shall collaborate with any person indemnified and may approve the payment of any claim under the agreement of indemnification, appear through the Attorney General on behalf of the person indemnified, take charge of such action, and settle or defend any such action. The Commission or the Secretary, as appropriate, shall have final authority on behalf of the United States to settle or approve the settlement of any such claim on a fair and reasonable basis with due regard for the purposes of this chapter. Such settlement shall not include expenses in connection with the claim incurred by the person indemnified.

. . .

(n) Waiver of defenses and judicial procedures

(1) With respect to any extraordinary nuclear occurrence to which an insurance policy or contract furnished as proof of financial protection or an indemnity agreement applies and which -

(A) arises out of or results from or occurs in the course of the construction, possession, or operation of a production or utilization facility,

(B) arises out of or results from or occurs in the course of transportation of source material, byproduct material, or special nuclear material to or from a production or utilization facility,

(C) during the course of the contract activity arises out of or results from the possession, operation, or use by a Department of Energy contractor or subcontractor of a device utilizing special nuclear material or byproduct material,

(D) arises out of, results from, or occurs in the course of, the construction, possession, or operation of any facility licensed under section 53, 63, or 81, for which the Commission has imposed as a condition of the license a requirement that the licensee have and maintain financial protection under subsection a.,

(E) arises out of, results from, or occurs in the course of, transportation of source material, byproduct material, or special nuclear material to or from any facility licensed under section 53, 63, or 81, for which the Commission has imposed as a condition of the license a requirement that the licensee have and maintain financial protection under subsection a., or

(F) arises out of, results from, or occurs in the course of nuclear waste activities.[8]

---

[8] So in original. Probably should be a comma.

the Commission or the Secretary, as appropriate, may incorporate provisions in indemnity agreements with licensees and contractors under this section, and may require provisions to be incorporated in insurance policies or contracts furnished as proof of financial protection, which waive (i) any issue or defense as to conduct of the claimant or fault of persons indemnified, (ii) any issue or defense as to charitable or governmental immunity, and (iii) any issue or defense based on any statute of limitations if suit is instituted within three years from the date on which the claimant first knew, or reasonably could have known, of his injury or damage and the cause thereof. The waiver of any such issue or defense shall be effective regardless of whether such issue or defense may otherwise be deemed jurisdictional or relating to an element in the cause of action. When so incorporated, such waivers shall be judicially enforceable in accordance with their terms by the claimant against the person indemnified. Such waivers shall not preclude a defense based upon a failure to take reasonable steps to mitigate damages, nor shall such waivers apply to injury or damage to a claimant or to a claimant's property which is intentionally sustained by the claimant or which results from a nuclear incident intentionally and wrongfully caused by the claimant. The waivers authorized in this subsection shall, as to indemnitors, be effective only with respect to those obligations set forth in the insurance policies or the contracts furnished as proof of financial protection and in the indemnity agreements. Such waivers shall not apply to, or prejudice the prosecution or defense of, any claim or portion of claim which is not within the protection afforded under (i) the terms of insurance policies or contracts furnished as proof of financial protection, or indemnity agreements, and (ii) the limit of liability provisions of subsection e.

(2) With respect to any public liability action arising out of or resulting from a nuclear incident, the United

States district court in the district where the nuclear incident takes place, or in the case of a nuclear incident taking place outside the United States, the United States District Court for the District of Columbia, shall have original jurisdiction without regard to the citizenship of any party or the amount in controversy. Upon motion of the defendant or of the Commission, or the Secretary, as appropriate, any such action pending in any State court (including any such action pending on August 20, 1988) or United States district court shall be removed or transferred to the United States district court having venue under this subsection. . . .

(3)(A) Following any nuclear incident, the chief judge of the United States district court having jurisdiction under paragraph (2) with respect to public liability actions (or the judicial council of the judicial circuit in which the nuclear incident occurs) may appoint a special caseload management panel (in this paragraph referred to as the "management panel") to coordinate and assign (but not necessarily hear themselves) cases arising out of the nuclear incident, if --

(i) a court, acting pursuant to subsection (o) of this section, determines that the aggregate amount of public liability is likely to exceed the amount of primary financial protection available under subsection (b) of this section (or an equivalent amount in the case of a contractor indemnified under subsection (d) of this section); or

(ii) the chief judge of the United States district court (or the judicial council of the judicial circuit) determines that cases arising out of the nuclear incident will have an unusual impact on the work of the court.

(B)(i) Each management panel shall consist only of members who are United States district judges or circuit judges.

(ii) Members of a management panel may indicate any United States district judge or circuit judge of another district court or court of appeals, if the chief judge of such other district court or court of appeals consents to such assignment.

(C) It shall be the function of each management panel --

(i) to consolidate related or similar claims for hearing or trial;

(ii) to establish priorities for the handling of different classes of cases;

(iii) to assign cases to a particular judge or special master;

(iv) to appoint special masters to hear particular types of cases, or particular elements or procedural steps of cases;

(v) to promulgate special rules of court, not inconsistent with the Federal Rules of Civil Procedure, to expedite cases or allow more equitable consideration of claims;

(vi) to implement such other measures, consistent with existing law and the Federal Rules of Civil Procedure, as will encourage the equitable, prompt, and efficient resolution of cases arising out of the nuclear incident; and

(vii) to assemble and submit to the President such data, available to the court, as may be useful in estimating the aggregate damages from the nuclear incident.

. . .

(s) Limitation on punitive damages

No court may award punitive damages in any action with respect to a nuclear incident or precautionary evacuation against a person on behalf of whom the United States is obligated to make payments under an agreement of indemnification covering such incident or evacuation.

(2)

No. 98-6

FILED
SEP 11 1998

In The

Supreme Court of the United States

October Term, 1997

EL PASO NATURAL GAS COMPANY, a Delaware Corporation; CYPRUS FOOTE MINERAL COMPANY, a Pennsylvania Corporation; and CYPRUS AMEX MINERALS COMPANY, a Delaware Corporation,

Petitioners,

vs.

LAURA NEZTSOSIE; ARLINDA NEZTSOSIE; and ZONNIE MARIE DANDY RICHARDS, individually and as Representative of the Estate of HAROLD J. RICHARDS, SR.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

BERNSTEIN LITOWITZ BERGER & GROSSMANN LLP
MAX W. BERGER
SETH RICHARD LESSER*
LOUIS C. PAUL
1285 Avenue of the Americas
New York, NY 10019
(212) 554-1400

CHERIE V. DAUT
P.O. Box 1537
Shiprock, NM 87420
(505) 368-5927

Attorneys for Respondents

* *Counsel of Record*

148449

Counsel Press LLC
FORMERLY LUTZ APPELLATE SERVICES
(800) 274-3321 • (800) 359-6859

QUESTION PRESENTED

Can an Indian tribal court be divested of adjudicatory authority to hear a case involving alleged tortious action which occurred on the tribe's territory and which harmed members of the tribe where there is no statute or regulation divesting the tribe of such authority or prohibiting it from hearing such a dispute?

TABLE OF CONTENTS

	Page
Question Presented	i
Table of Contents	ii
Table of Cited Authorities	iii
Statement of the Case	1
Reasons for Denying the Writ	3
I. This Case Presents No Issue That Will Escape Federal Court Review.	6
II. The Ninth Circuit Correctly Held That The Tribal Exhaustion Doctrine Requires That This Case First Proceed In Tribal Court.	7
A. There Is No Regulatory And Adjudicatory Preemption Here	8
B. Petitioners Ignore Established Principles Of Indian Sovereignty	10
C. This Court's Decision In *Strate* Is Inapplicable Here	13
III. The Ninth Circuit's Action In Dissolving The Trial Courts' Injunction Was Proper.	15
Conclusion	17

TABLE OF CITED AUTHORITIES

	Page
Cases Cited:	
Becenti v. Vigil, 902 F.2d 777 (10th Cir. 1990)	13
Brown v. Fauver, 819 F.2d 395 (3d Cir. 1987)	16
Fortino v. Quasar Company, 950 F.2d 389 (7th Cir. 1991)	16
Gade v. National Solid Wastes Management Assn., 505 U.S. 88 (1992)	8
Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9 (1987)	3, 7, 11, 13
Kerr-McGee Corp. v. Farley, 115 F.3d 1498 (10th Cir. 1997), *cert. denied*, 118 S. Ct. 880 (1998)	2, 3, 5, 10, 13
Maryland v. Louisiana, 451 U.S. 725 (1981)	8
Medtronic, Inc. v. Lohr, 518 U.S. 470 (1996)	8
Merrion v. Jicarilla Apache Tribe, 455 U.S. 130	11
Montana v. United States, 450 U.S. 544 (1981)	14
National Farmers Union Ins. Co. v. Crow Tribe of Indians, 471 U.S. 845 (1985)	2, 3, 7, 11
Northern States Power v. Prairie Island Mdewakanton Sioux Indian Community, 991 F.2d 458 (8th Cir. 1993)	12

Page

Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n, 461 U.S. 190 (1983) 9

Rice v. Norman Williams Co., 458 U.S. 654 (1982) 9

Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978) 11

Schlesinger v. Councilman, 420 U.S. 738 (1975) 15, 16

Silkwood v. Kerr-McGee Corp., 464 U.S. 238 (1984) 9

Smith v. Moffett, 947 F.2d 442 (10th Cir. 1991) 11, 16

South Dakota v. Bourland, 508 U.S. 679 (1993) 12

Strate v. A-1 Contractors, __ U.S. __, 117 S. Ct. 1404 (1997) 7, 13, 14, 15

Thomas v. Indiana, 910 F.2d 1413 (7th Cir. 1990) ... 16

United States v. Plainbull, 957 F.2d 724 (9th Cir. 1992) 13

United States v. Wheeler, 435 U.S. 313 (1978) 11

United States v. White, 508 F.2d 453 (8th Cir. 1974) 11

Younger v. Harris, 401 U.S. 37 (1971) 16

Page

Statutes Cited:

15 U.S.C. § 78(aa) 12

15 U.S.C. § 717(u) 12

25 U.S.C. § 737(c) 12

25 U.S.C. § 1132(e) 12

25 U.S.C. § 1300g-6(c) 12

28 U.S.C. § 1332 13

28 U.S.C. § 1355 13

28 U.S.C. § 1441 13

42 U.S.C. § 2011 *et seq.* 2

42 U.S.C. § 2014(hh) 4, 9

42 U.S.C. § 2210(n)(2) 5

42 U.S.C. § 6903(13)(A) 12

42 U.S.C. § 9613(b) 12

STATEMENT OF THE CASE

Petitioners are two mining companies that during the 1950's and 1960's mined for uranium in various locations on the Navajo Nation's reservation.

The underlying lawsuits in this litigation were commenced in April 1995 in the Tuba City and Kayenta District Courts of the Navajo Nation. The first of the lawsuits (*Neztsosie*) was brought by two Navajo sisters arising out the neuropathic disease from which they are suffering. The second lawsuit (*Richards*) arises out of the cancer-caused death of the plaintiff's husband. Both complaints allege that negligent mining operations by the defendants resulted in radioactive, toxic and chemical exposures that caused the respective diseases. In the *Neztsosie* case, for instance, the claim is that after defendants ceased their mining operations, they abandoned the mines without remediation, leaving the contaminated mines open as collection points for water which was then drunk by the Navajo plaintiffs' mother. The land on which the mines were situated was owned by the Navajo Nation and licensed to petitioners.

The Navajo Nation has a complete court system analogous to state court systems, including trial courts and a Supreme Court. The Navajo Nation has due process guarantees and a code of civil procedure modeled on the Federal Rules of Civil Procedure. Navajo court decisions are reported in the Navajo Law Reporter.

On January 5, 1996 and on June 26, 1996, respectively, petitioners filed lawsuits in the United States District Court for the District of Arizona seeking to enjoin the Navajo court plaintiffs from proceeding with their underlying lawsuits on the ground that the Navajo tribal courts lacked jurisdiction to

hear claims against these petitioners. Petitioners asserted that the Price-Anderson Act, 42 U.S.C. § 2011 *et seq.*, created both a purportedly exclusive federal cause of action and a federal adjudicatory forum to resolve any cases arising from a "nuclear incident". (*See* Petitioners' Appendix, hereinafter "PA", 3a, 4a.)

Relying on the tribal exhaustion doctrine, as set forth in *National Farmers Union Ins. Co. v. Crow Tribe of Indians*, 471 U.S. 845 (1985), and in order to "preserve[ ] tribal authority in its fullest measure" by permitting the Navajo courts to decide in the first instance the issue of their jurisdiction (PA 29a, 30a), the District Court refused to enjoin the tribal court lawsuits. The District Court did not rule on whether the claims at issue were encompassed by the Price-Anderson Act but it enjoined the Navajo plaintiffs from pursuing any Price-Anderson Act claims in tribal court. *Id.* The District Court's opinion is unreported.

Petitioners appealed to the Ninth Circuit which, on February 11, 1998, in a two to one decision written by Judge Pregerson, denied their appeal, affirming the District Court's ruling permitting the underlying tribal court lawsuits to proceed in Navajo Court. 136 F.3d 610. The Ninth Circuit's decision, which was based upon the tribal exhaustion doctrine, concluded that nothing in the Price-Anderson Act constituted an express prohibition on the jurisdiction of Indian courts. PA 12a-19a. Since the district court had enjoined the Navajo plaintiffs from pursuing "Price-Anderson" claims in tribal court, the Ninth Circuit *sua sponte* addressed the propriety of this injunction because of the comity issues it presented (PA 9a) and dissolved the injunction (PA 19a).[1] On April 27, 1998, the Court of

1. In so doing, the Court noted (PA 9a) that the Tenth Circuit had just rejected a similar claim in the *Kerr-McGee Corp. v. Farley* case discussed immediately below.

Appeals denied both petitioners' petition for rehearing and their suggestion for a rehearing en banc. PA 24a-26a.

REASONS FOR DENYING THE WRIT

There is no issue presented here that warrants this Court's review.

First, just eight months ago, this Court denied a writ of *certiorari* in an effectively identical case coming out of the Tenth Circuit, *Kerr-McGee Corp. v. Farley*, 115 F.3d 1498 (10th Cir. 1997), *cert. denied*, 118 S. Ct. 880 (1998). In fact, the second petitioner in that case was the second petitioner in this case, Cyprus Foote Mineral Company, and many of the same attorneys who appeared on the prior petition are on the present petition. Except for a different sequence in the arguments, the present petition essentially repeats the contentions made in the previous petition.

The only additional development that has occurred since this Court denied the prior petition is that the Ninth Circuit in the decision below joined the Tenth Circuit in rejecting petitioners' contentions.

Thus, far from there being a conflict among the Circuits, the two Circuits that have addressed the sole determinative issue in these cases — whether the Price-Anderson Act prohibits an Indian tribal court from hearing a tort lawsuit arising out of the negligent operation of a uranium mine — have concluded that there is nothing in the Price-Anderson Act which precludes application of the tribal exhaustion doctrine established by *National Farmers Union Ins. Co., supra*, and *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9 (1987). The cases petitioners cite to support their allegation of a conflict are only (a) the Tenth Circuit *Kerr-McGee* decision which presents no conflict at all

since it — like the decision below — held that the Navajo courts should first rule on Price-Anderson claims before a federal court rules passes on these issues and (b) federal court decisions that, as the Court below recognized, are "inapplicable" here because "they only address federal-state jurisdictional issues related to Price-Anderson" and "do not address Indian tribes or tribal sovereignty," PA 16a, the situation presented here.

Second, the Court of Appeals' decision below was merely one of abstention pending re-review — a decision holding that the issue of federal regulatory or adjudicatory exclusivity should first be heard by the Navajo courts prior to a possible reconsideration by the federal courts. Contrary to petitioners' intimations, the present issues will not escape federal court review. Petitioners will have the ability to challenge the Navajo courts' decision on jurisdiction should these cases proceed to judgment and appeal.

Third, petitioners' claims are misplaced. Their notion is that there is complete federal regulatory *and* judicial preemption concerning anything which involves uranium. However, there is no such preemption. Petitioners cannot point to anything in the Price-Anderson statute or in its legislative history that provides for complete federal preemption, much less a prohibition on Indian tribal courts hearing Price-Anderson Act claims (even assuming there existed complete federal regulatory preemption over nuclear torts). Lacking any legislative support for the preemption they claim, the only support they present for their position is *dicta* in several decisions, not one of which concerned the relevant issue here, that of Indian tribal court jurisdiction. To the contrary, the relevant provision of the applicable law, the Price-Anderson Act, expressly provides that cases involving injury from nuclear incidents are to be governed by substantive *state* law, 42 U.S.C. § 2014(hh), — a provision totally inconsistent with any proposition that the federal government's regulatory authority is exclusive.

Nor is there an "exclusive federal remedy for nuclear-related torts." (Pet. 10.) The Price-Anderson Act, by its very terms provides for *concurrent* federal and state court jurisdiction (with a right of removal from state to federal court). 42 U.S.C. § 2210(n)(2). While petitioners claim that this creates an exclusive federal remedy, the Ninth Circuit correctly pointed out that petitioners' support for this proposition are the "inapplicable" cases that do not "do not address Indian tribes or tribal sovereignty."[2]

Necessarily, petitioners' claim comes down to the contention that Congress must have *meant to* provide for both an exclusive federal remedy and federal court jurisdiction for cases filed in Indian courts even though it did not do so explicitly. Yet, this claim by petitioners — which is all they can really assert — turns the historic tribal sovereignty analysis on its head, as was recognized by the Ninth Circuit below, *see* PA 16a-17a, and by the Tenth Circuit in *Farley*, 115 F.3d at 1504. The inescapable fact is that well-established principles of federal law hold that Indian tribes cannot be divested of jurisdiction in the absence of an express and specific Congressional enactment. Nothing in the Price-Anderson Act divests Indian courts of jurisdiction to hear claims involving tortious injury arising out of uranium mining.

---

2. Astoundingly, petitioners count the Tenth Circuit as one of the "four" circuits that supposedly accepts the view that Price-Anderson "federalized" all nuclear torts (Pet. 6, 10). What the Tenth Circuit actually held was that torts arising out of nuclear incidents are governed by Price-Anderson. The Court *did not* hold that the act "federalized" nuclear torts for adjudicatory purposes. To the contrary, it expressly rejected petitioners' contentions that Price-Anderson created an exclusive federal venue for nuclear torts that arise on Indian territory and, accordingly, ruled, like the Ninth Circuit, below, that the tribal exhaustion doctrine required nuclear tort cases to proceed first in tribal courts. 115 F.3d at 1505, 1509.

The Ninth Circuit Court of Appeals correctly rejected petitioners' argument. The petition should be denied.

I.

THIS CASE PRESENTS NO ISSUE THAT WILL ESCAPE FEDERAL COURT REVIEW.

Petitioners cannot deny that the decision below was an application of the tribal exhaustion doctrine and, accordingly, there ultimately can be federal court review of their arguments, if they wish it.

First, the decision below was only the second to address the issue of the Price-Anderson Act's applicability to Indian tribes. The only other Court of Appeals, the Tenth Circuit, that has addressed the issue has also rejected petitioners' arguments that the tribal exhaustion doctrine does not apply to nuclear torts arising on Indian lands.

Second, notwithstanding what petitioners try to suggest to the Court, they will have full opportunity to challenge the issues presented in the courts below. Three results are possible in the underlying cases: (a) petitioners could win in the tribal courts; (b) the cases could settle; or (c) the Navajo plaintiffs-respondents could succeed in the tribal courts and then petitioners could raise the jurisdictional issue anew in federal court. While the Navajo trial courts have thus far found jurisdiction, the decisions of these courts on these matters will be subject to review by the Navajo Supreme Court. And, ultimately, the issue of jurisdiction could then, again, be raised by petitioners in the federal courts.

It is thus premature for petitioners to contend that this Court should review these cases when the jurisdictional contentions

petitioners are now making have yet to be finally decided by the tribal courts. Recourse to this Court is neither necessary nor efficient.

II.

THE NINTH CIRCUIT CORRECTLY HELD THAT THE TRIBAL EXHAUSTION DOCTRINE REQUIRES THAT THIS CASE FIRST PROCEED IN TRIBAL COURT.

Petitioners do no better on the merits of their claim.

Initially, petitioners all-but ignore the specific basis upon which the court below ruled — the "tribal exhaustion doctrine" established by this Court in *National Farmers Union Ins. Co.*, *supra*, and *Iowa Mut. Ins. Co.*, *supra*. This doctrine is based on Congress' policy of encouraging tribal self-government. *See National Farmers Union*, 471 U.S. at 856-857. Under the doctrine, when a lawsuit is brought over which an Indian tribal court may have jurisdiction, a defendant may not challenge in federal court the tribal court's exercise of jurisdiction without first exhausting all tribal court remedies so long as three exceptions are not applicable: (a) the assertion of tribal jurisdiction is not motivated by a desire to harass or is conducted in bad faith; (b) the action is not "patently violative" of an "express jurisdictional prohibition"; or (c) "exhaustion would be futile because of the lack of an adequate opportunity to challenge the [tribal] court's jurisdiction." *National Farmers*, 471 U.S. at 856 & n.21; *Iowa Mutual Ins. Co.*, 480 U.S. at 19 & n.12; *see also Strate v. A-1 Contractors*, __ U.S. __, 117 S. Ct. 1404, 1411 & n.7 (1997). Ignoring the tribal exhaustion doctrine, petitioners have brought these cases in federal court to enjoin tribal court lawsuits without first exhausting tribal court remedies.

Petitioners do not contend that they meet any of the three exceptions to the tribal exhaustion doctrine. Rather, their contention is that "exhaustion should not be required where a tribal cause of action has been preempted by federal law." (Pet. 7 (initial capitals deleted).) However, the very premise upon which their argument relies is flawed since "federal law" has not preempted the right of Navajo tribal courts to hear the present cases. This is shown by the reasons set forth below.

A. There Is No Regulatory And Adjudicatory Preemption Here

This Court has consistently stated that there exists a presumption against finding a preemption of state law by federal law and that the evidence supporting preemption must be compelling. *E.g.*, *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 484-485 (1996); *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981). Notwithstanding the strong showing that must be made before preemption will be found, defendants can point to nothing in the Price-Anderson Act or in its legislative history, or in any applicable federal rule or regulation that supports their contention that this Act preempted Indian tribes either on a regulatory or on an adjudicatory basis from hearing the present claims. Nor can they cannot point to a single federal regulation or rule that would be impermissibly flouted by the Navajo courts' hearing the present cases. *See Medtronic, Inc.*, 518 U.S. at 484 (even where a federal statute expressly preempts state law, it is necessary to "nonetheless identify the domain expressly pre-empted by that language) (citation omitted); *see also Gade v. National Solid Wastes Management Assn.*, 505 U.S. 88, 110 (1992) (Kennedy, J., concurring in part and concurring in judgment) ("Our decisions establish that a high threshold must be met if a state law is to be preempted for conflicting with the purposes of a federal Act. Any conflict must be 'irreconcilable. . . . The existence of a hypothetical or

potential conflict is insufficient to warrant the pre-emption of the state statute.") (quoting *Rice v. Norman Williams Co.*, 458 U.S. 654, 659 (1982).

All that petitioners can cite for their preemption contentions are (1) *dicta* from *Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n*, 461 U.S. 190 (1983), concerning the federal government's exclusive right to license nuclear materials (not an issue even vaguely relevant here) and a generalized statement from *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248 (1984) (holding that the Price-Anderson Act did not preempt punitive damage claims), concerning federal preemption over "nuclear safety" (Pet. 8) and (2) the 1988 amendments to the Price-Anderson Act.

The worthlessness of petitioners' citations is seen in the fact that it was not until its 1988 amendments, as the Ninth Circuit noted, that the Price-Anderson Act could have affected any lawsuit other than those where the Nuclear Regulatory Commission determined that an "extraordinary nuclear occurrence" had occurred. PA 10a-11a. Thus, the *Pacific Gas* and *Silkwood* decisions cannot possibly stand for the proposition that the Price-Anderson Act provides both an exclusive federal remedy and federal jurisdiction over nuclear torts since those decisions predate the amendments.

Nor do the 1988 amendments to the Act provide any solace for petitioners. Those amendments expressly provide that in an action arising out of a "nuclear incident", the "substantive rules for decision in such action shall be derived from the law of the State in which the nuclear incident involved occurs, unless such law is inconsistent" with provisions of the Act. 42 U.S.C. § 2014(hh). Since State substantive law can provide the rule of decision in a nuclear tort case, this provision in the 1988 amendments is totally inconsistent with any claim that the

federal government's regulatory authority is *exclusive* over nuclear torts.[3]

In short, petitioners' arguments as to preemption are vague and overbroad assertions that fail even to begin to meet the rigorous requirements for showing the existence of such preemption.

B. Petitioners Ignore Established Principles Of Indian Sovereignty

Even if a legitimate issue existed as to whether Congress intended absolutely to preempt *state* regulatory authority over any tortious claims arising from the operation of a facility related to the nuclear industry, the present cases involve the alleged preemption of *Indian* rights and sovereignty, an entirely

3. As previously discussed, the decisions of other courts concerning the Price-Anderson Act's scope cited at pages 10-11 of the petition are simply "inapplicable" because "they only address federal-state jurisdictional issues relating to Price-Anderson. They do not address Indian tribes or tribal sovereignty." (PA 16a.) Petitioners also try to cite *Kerr-McGee Corp. v. Farley, supra*, as somehow supporting their contentions (Pet. 11). However, as also previously noted, that case concluded that there was nothing in the Price-Anderson Act that constituted an express jurisdictional bar to Navajo courts from hearing Price-Anderson claims. Petitioners profess to find that decision "inexplicabl[e]." (Pet. 11 n.10) What petitioners apparently fail to understand is that even if federal regulatory authority concerning nuclear safety was absolute, this does not mean there could not be concurrent federal and Indian jurisdiction to hear Price-Anderson Act claims. The Ninth Circuit made this abundantly clear when it correctly stated: "even if Price-Anderson preempts *state court* jurisdiction — still an open issue in this circuit — there is no express prohibition of *tribal court jurisdiction*." (PA 16a) As the Ninth Circuit recognized (PA 17a), and, as is discussed below, there is no implied divestiture of tribal court jurisdiction to hear lawsuits.

separate and distinct analysis from that concerning state governments. Petitioners completely ignore this difference.

As the court below recognized (PA 16a), "Indian tribes occupy a unique status under our law." *National Farmers Union*, 471 U.S. at 851. One important aspect of their unique status is that Indian jurisdiction over Indian lands is absolute unless expressly limited by Congress. This Court wrote in *Iowa Mut. Ins.*, "[t]ribal authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty" and that "[c]ivil jurisdiction over such activities presumptively lies in the tribal courts unless *affirmatively limited* by a specific treaty provision or federal statute." 480 U.S. at 18.

While Congress has the power to limit or abolish a tribe's sovereignty, the "Congressional intent to infringe on tribal sovereignty must be clear." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 60 (1978). Because Indian tribes

> retain[ ] all inherent attributes of sovereignty that have not been divested by the Federal Government, *the proper inference from [Congressional] silence . . . is that the sovereign power . . . remains intact.*

Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 149 n.14 (emphasis supplied); *accord Iowa Mut. Ins.*, 480 U.S. at 18; *see also United States v. Wheeler*, 435 U.S. 313, 323 (1978) (until Congress acts to diminish tribal sovereignty, "the tribes retain their existing sovereign powers"); *Smith v. Moffett*, 947 F.2d 442, 444 (10th Cir. 1991) ("Jurisdiction presumptively lies in the tribal court . . . unless Congress has expressly limited that jurisdiction."); *United States v. White*, 508 F.2d 453, 456 (8th Cir. 1974) (statutes should not be construed so as to

abrogate rights of tribal self-government absent specific Congressional intent to the contrary).[4]

If Congress wished to do so, it certainly knows how to provide for express federal jurisdiction and how to divest tribal courts of jurisdiction.[5] Since Congress did not divest Indian courts of jurisdiction to hear tort claims arising out of nuclear facilities (even assuming that there is complete federal regulatory preemption), the Price-Anderson Act must be construed as written and not rewritten by the courts to say what petitioners believe Congress must have meant. To hold

4. Petitioners do not even dispute these fundamental aspects of tribal jurisprudence. Indeed, at footnote 4 their petition cites two cases that actually undercut their contentions and support respondents' position here. In both of those cases — unlike the situation presented here — the finding of preemption of Indian authority was based on acts of Congress that *specifically* divested Indian tribes of authority. *See South Dakota v. Bourland*, 508 U.S. 679, 689 (1993) (discussing how the Flood Control Act and the Cheyenne River Act specifically abrogated a tribe's ability to exclude non-Indian hunting and fishing); *Northern States Power v. Prairie Island Mdewakanton Sioux Indian Community*, 991 F.2d 458, 460-461 (8th Cir. 1993) (referring to the the Hazardous Materials Transportation Act which explicitly provided the circumstances (found to exist in that case) where "any requirement of a State or political subdivision or *Indian tribe* is preempted").

5. *See, e.g.*, 15 U.S.C. § 78(aa) (securities fraud lawsuits: "The District Courts of the United States . . . shall have exclusive jurisdiction . . . of all suits in equity and actions at law brought to enforce any liability or duty created this Chapter."); *see also, e.g.*, 42 U.S.C. § 9613(b) (environmental laws); 15 U.S.C. § 717(u) (natural gas regulation); 25 U.S.C. § 1132(e) (ERISA); 42 U.S.C. § 6903(13)(A) (CERCLA provisions specifically making Act applicable to "Indian tribe[s] or authorized tribal organization[s]); 25 U.S.C. § 737(c) (providing that federal courts shall have exclusive jurisdiction concerning violations of law arising out of gaming activities conducted by the Alabama and Coushatta Indian Tribes of Texas); 25 U.S.C. § 1300g-6(c) (same; Yselta del Sur Pueblo tribe).

otherwise would do violence to well-established bases of Indian law.[6]

C. This Court's Decision In *Strate* Is Inapplicable Here

Petitioners argue that the Ninth Circuit's decision here "undermines" (Pet. 13) this Court's decision of last term in *Strate v. A-1 Contractors*, *supra*, because it requires exhaustion of tribal court jurisdiction "Notwithstanding the Absence of Both Tribal Regulatory Jurisdiction and Any Useful Purpose for Exhaustion". (Pet. 13.) Obviously, this argument requires petitioners to prove first that there exists, in fact, complete federal preemption over the present cases, a showing they cannot make, as just shown.

Furthermore, as the Ninth Circuit held, *Strate* is simply inapplicable here. PA 14a-15a n.5. (The Tenth Circuit also recognized *Strate*'s inapplicability in *Kerr-McGee*, 115 F.3d at 1506 n.4, "[a]fter carefully reviewing *Strate*".)

6. This is precisely why the courts, including this one, have repeatedly rejected the proposition that Indian courts can implicitly be stripped of jurisdiction. *See, e.g., Iowa Mut. Ins.*, 480 U.S. at 17-19 (interpreting 28 U.S.C. § 1332, the diversity jurisdiction statute); *United States v. Plainbull*, 957 F.2d 724, 726-727 (9th Cir. 1992) (where statute, 28 U.S.C. § 1355, provided for federal jurisdiction of cases "exclusive of the courts of the States", such a delegation of exclusive jurisdiction to federal courts did not apply to tribal courts because "a tribal court is not a state court" and tribal courts were therefore not divested of concurrent jurisdiction); *Becenti v. Vigil*, 902 F.2d 777, 780 (10th Cir. 1990) (where federal removal statute, 28 U.S.C. § 1441, provided for removal of cases from "state" courts but not from tribal courts, the court wrote, "The question before us, however, is not whether Congress has the power to authorize removal of actions commenced in tribal courts against federal officials, but rather whether Congress has in fact done so. . . . With this in mind, we conclude that the statutory language referring to actions commenced in 'State court' does not extend to an action in the Jicarilla Apache Tribal Court.").

In *Strate*, the Court addressed the interplay between the tribal exhaustion doctrine and the limits on tribal court jurisdiction set forth in *Montana v. United States*, 450 U.S. 544 (1981). Under *Montana*, tribal jurisdiction over a lawsuit involving non-tribe members can lie concerning incidents that arise on *non-Indian*-owned land within a reservation if either there is a "consensual relationship" between the defendant's activity at issue and the tribe's regulatory authority or the conduct at issue "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Strate*, 117 S. Ct. At 1409 (summarizing *Montana*).

Strate involved the adjudicatory reach of a tribal court where (1) a controversy existed between two non-Indian parties, (2) which arose out of an accident on a State highway as to which an Indian tribe had ceded control and thus constituted "alienated, non-Indian land", and (3) no statute or treaty authorized the tribe to govern the conduct of nonmembers on the highway in question. *Strate*, 117 S. Ct. at 1407. The Court's discussion of regulatory and adjudicatory authority upon which petitioners rely thus arose in a situation where a non-Indian was seeking to invoke tribal court jurisdiction against another non-Indian arising out of an incident that occurred *on non-tribal lands*. Since the tribe had no regulatory authority over either the land or the activity in question, it also could not have adjudicatory authority under the *Montana* analysis. Indeed, the Court stressed that the case involved a dispute that is "distinctly nontribal in nature", *id.* at 1407, and explicitly stated that its decision "express[ed] no view on the governing law or proper forum when an accident occurs on a tribal road within a reservation." *Id.* at 1406.

Petitioners' attempt to stretch *Strate* to govern the present case will not wash. Here, (1) the underlying lawsuits are brought

by members of the Navajo tribe; (2) the incidents giving rise to the underlying lawsuits — injury from abandoned mines and milling operations — took place *exclusively* on tribal lands; and (3) the tribe never divested itself of jurisdiction over either the activities at issue or the tribal lands in question. The essence of the present cases is that they involve personal injury claims brought by tribal Indians in their own tribal court alleging harms caused to them by non-Indians who entered onto the tribe's land pursuant to consensual relationships with the tribe. As the Ninth Circuit pointed out, unlike *Strate*, "the Navajo Nation retained tribal sovereignty over the land the mining companies occupied, which land was neither open to the public nor controlled or maintained by any entity other than tribe." (PA 15a at n.5).

III.

THE NINTH CIRCUIT'S ACTION IN DISSOLVING THE TRIAL COURTS' INJUNCTION WAS PROPER.

Petitioners last half-heartedly contend (Pet. 16-17) that the Court of Appeals erred by issuing a decision that vacated an unappealed portion of the district court's decision — that portion of the decision which retained jurisdiction in the district court as to Price-Anderson claims.

Contrary to petitioners' hyperbolic assertions of "confusion" and "uncertainty on a central question of appellate jurisdiction" (Pet. 17), the Court of Appeals' ruling is entirely consistent with the decisions of this Court and that of other Courts of Appeals which have repeatedly *sua sponte* raised, addressed and even decided unappealed issues on the grounds of comity. *See, e.g., Schlesinger v. Councilman*, 420 U.S. 738, 743 (1975) (raising issue of exhaustion of proceedings in the military courts because "although normally we do not consider

questions raised neither below nor in the petition, the jurisdictional and equity issues necessarily implicit in this case seemed sufficiently important to raise them *sua sponte*") (citations omitted); *Smith v. Moffett*, 947 F.2d 442, 445 (10th Cir. 1991) (raising issue of tribal exhaustion *sua sponte*); *Fortino v. Quasar Company*, 950 F.2d 389, 391 (7th Cir. 1991) (raising applicability of a statute that had not been raised in the case "for the sake of international comity, amity and commerce"); *Thomas v. Indiana*, 910 F.2d 1413, 1415 (7th Cir. 1990) (raising exhaustion of state remedies in habeas case because "delicate questions of comity can be raised on the court's own initiative. . . .") (citing *Younger v. Harris*, 401 U.S. 37, 40 (1971) and *Schlesinger*, *supra*); *Brown v. Fauver*, 819 F.2d 395, 398 (3d Cir. 1987) (raising inmate's failure to exhaust state remedies *sua sponte* because of the federal court's "interest in minimizing conflict with its state counterparts").

Additionally, the Ninth Circuit's ruling was clearly appropriate under the particular facts of these cases. Its analysis of the cases would have been identical with or without its order directing the district court to dissolve its injunction on Price-Anderson Act claims. Petitioners' appeals had challenged the application of the tribal exhaustion doctrine by the district court. Petitioners' appeals were predicated on their argument that the Price-Anderson Act had preempted the tribal claims. Respondents' arguments against petitioners' appeals challenged petitioners' assertions. In order to rule on petitioners' appeals, the Ninth Circuit necessarily had to address the question of whether the Price-Anderson Act provided an exception to the tribal exhaustion doctrine.

By ruling that the Price-Anderson Act did not provide an exception to the tribal exhaustion doctrine, the district court's action in enjoining the prosecution of Price-Anderson claims in the tribal court proceeding was a ruling that *a fortiori*

conflicted with the Ninth Circuit's conclusion. If the Ninth Circuit had not reversed the trial court's mandatory injunction, then, upon receipt of the Ninth Circuit's decision, respondents would simply have asked the district court to vacate the injunction in light of the ruling that the Ninth Circuit had made and it presumably would have had to have done so. Thus, all the Ninth Circuit actually did was save an unnecessary proceeding in the district court, and at the same time promote comity by ensuring that the Navajo courts would have an unfettered hand in addressing the issues presented to them. (The Ninth Circuit also thereby avoided a potentially repetitive appeal to itself.) These unique circumstances are hardly likely to be repeated.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

CHERIE V. DAUT
P.O. Box 1537
Shiprock, NM 87420
(505) 368-5927

BERNSTEIN LITOWITZ BERGER
& GROSSMANN LLP
MAX W. BERGER
SETH RICHARD LESSER*
LOUIS C. PAUL
1285 Avenue of the Americas
New York, NY 10019
(212) 554-1400

Attorneys for Respondents

* *Counsel of Record*

Supreme Court, U.S.
FILED
SEP 25 1998
OFFICE OF THE CLERK

No. 98-6

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1998

EL PASO NATURAL GAS COMPANY, A DELAWARE CORPORATION; CYPRUS FOOTE MINERAL COMPANY, A PENNSYLVANIA CORPORATION; AND CYPRUS AMAX MINERALS COMPANY, A DELAWARE CORPORATION,

PETITIONERS,

v.

LAURA NEZTSOSIE; ARLINDA NEZTSOSIE; AND ZONNIE MARIE DANDY RICHARDS, INDIVIDUALLY AND AS REPRESENTATIVE OF THE ESTATE OF HAROLD J. RICHARDS, SR.,

RESPONDENTS.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

REPLY BRIEF FOR PETITIONERS

Lynn H. Slade
Walter E. Stern
MODRALL, SPERLING, ROEHL, HARRIS & SISK, P.A.
500 Fourth Street, N.W.
NationsBank Tower, Suite 1000
Albuquerque, NM 87103
(505) 848-1800

Tom Galbraith
LEWIS & ROCA
40 North Central Avenue
Phoenix, AZ 85004-4429
(602) 262-5311

James R. Atwood*
Richard A. Meserve
COVINGTON & BURLING
1201 Pennsylvania Ave., N.W.
P.O. Box 7566
Washington, D.C., 20044-7566
(202) 662-6000

Attorneys for Petitioners

* Counsel of Record

13 pp

TABLE OF CONTENTS

	Page
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	iii
ARGUMENT	1
1. The Ninth Circuit's Decision Is Manifestly Erroneous	1
2. Review by this Court Is Necessary and Warranted	7
CONCLUSION	9

TABLE OF AUTHORITIES

CASES

	Page
Blue Legs v. B.I.A.,	5
Federal Power Commission v. Tuscarora Indian Nation, 362 U.S. 99 (1960)	4
In re TMI Litigation Cases Consolidated II, 940 F.2d 832 (3d Cir. 1991)	2,3,8
Kerr-McGee Corp. v. Farley, 115 F.3d 1498 (10th Cir. 1997), *cert. denied*, 118 S. Ct. 880 (1998)	2,7-8
Lazore v. C.I.R., 11 F.3d 1180 (3d Cir. 1993)	4
Lumber Industry Pension Fund v. Warm Springs Forest Products Industries, 939 F.2d 683 (9th Cir. 1991)	4
National Farmers Union Insurance v. Crow Tribe, 471 U.S. 845 (1985)	4,5
Nieman v. NLO, Inc., 108 F.3d 1546 (6th Cir. 1997)	2
O'Conner v. Commonwealth Edison Co., 13 F.3d 1090 (7th Cir. 1994)	2,3
Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978)	6
Reich v. Mashantucket Sand & Gravel, 95 F.3d 174 (2d Cir. 1996)	4

Page

Roberts v. Florida Power & Light Co., 146 F.3d 1305 (11th Cir. 1998) 2,3

Strate v. A-1 Contractors, 117 S. Ct. 1404 (1997) . . . . . *passim*

U.S. Department of Labor v. OSHRC, 935 F.2d 182 (9th Cir. 1991) 4-5

STATUTES

Price-Anderson Act, Pub. L. No. 85-256, 71 Stat. 576 (1957), as amended by the Price-Anderson Amendments Act of 1988, Pub. L. No. 100-408, 102 Stat. 1066 (1988) . . . . . *passim*

LEGISLATIVE MATERIALS

H.R. Rep. No. 100-104 (1987) 2

ARGUMENT

Respondents all but ignore two central points of the petition for certiorari and of the well-reasoned dissent below:

One, the only claims respondents are asserting in tribal court are claims under tribal law, and the Price-Anderson Amendments Act clearly preempts such claims as a matter of substantive federal law. Hence, there is no surviving claim in tribal court to exhaust.

Two, this Court held in *Strate v. A-1 Contractors* that tribal courts lack adjudicatory jurisdiction over nonmembers' conduct in those instances where the tribe lacks jurisdiction to regulate the conduct. 117 S. Ct. 1404, 1413 & 1416 n.14 (1997). The Court also held, in a passage that respondents fail even to cite, that where it is plain that regulatory and thus adjudicatory jurisdiction is lacking, "the otherwise applicable exhaustion requirement must give way, for it would serve no purpose other than delay." *Id.* n.14 (internal citation omitted). Here, the federal government's exclusive regulatory authority with respect to nuclear activities forecloses application of tribal law. Hence, under *Strate*, the tribal courts have no adjudicatory jurisdiction, and exhaustion is not required.

The petition for certiorari should be granted. The opinion below seriously undermines both Congress' mandate that nuclear torts be governed exclusively by a federal-law regime, and this Court's teachings in *Strate* on the limits of tribal jurisdiction and the exhaustion doctrine as applied to nonmembers.

A. The Ninth Circuit's Decision Is Manifestly Erroneous.

1. Respondents stress that Price-Anderson does not explicitly address tribal-court jurisdiction over nuclear torts. But, that is irrelevant in light of a more basic point: Price-

Anderson *does* unequivocally preempt, as a matter of substantive law, *all* nuclear-tort claims that are not based on that federal statute. Thus, the claims that respondents seek to pursue in tribal court, which are entirely tribal-law claims as to which respondents themselves maintain Price-Anderson has no relevance,[1/] have been preempted by federal law.

The preemption is explicit because the Price-Anderson Amendments Act states that "any suit" brought in the United States for a nuclear tort "shall be deemed to be an action arising under section 2210 of this title." 42 U.S.C. § 2014(hh). Congress' objective was to expand Price-Anderson's regulatory provisions "to effect uniformity, equity, and efficiency" in resolving nuclear tort litigation. *In re TMI Litig. Cases Consol. II*, 940 F.2d 832, 857 (3d Cir. 1991); *see* H.R. Rep. No. 100-104, pt. 1, at 18 (1987). Thus, the lower courts have uniformly held that a nuclear tort claim "is compensable under the terms of the Amendments Act or *it is not compensable at all.*" *TMI*, 940 F.2d at 854 (emphasis in original); *Nieman v. NLO, Inc.*, 108 F.3d 1546, 1553 (6th Cir. 1997); *O'Conner v. Commonwealth Edison Co.*, 13 F.3d 1090, 1099 (7th Cir. 1994); *Kerr-McGee Corp. v. Farley*, 115 F.3d 1498, 1504 (10th Cir. 1997), *cert. denied*, 118 S. Ct. 880 (1998).[2/] Very recently, the Eleventh Circuit joined this chorus of authority. *Roberts v. Florida Power & Light Co.*, 146 F.3d 1305 (11th Cir. July 22, 1998) (state causes of action dismissed as preempted by Price-Anderson).

[1/] At respondents' invitation, the tribal court held that "the Price-Anderson Act has no application to this case." Order Denying Defendant's Motions To Dismiss, Pet. at 4.

[2/] While claiming that our petition misrepresented *Farley*, respondents acknowledge the one holding of that case on which we relied: "What the Tenth Circuit actually held was that torts arising out of nuclear incidents are governed by Price-Anderson." Opp. at 5 n.2. We agree.

In resisting preemption, respondents rely heavily on an argument that Price-Anderson claims are governed by state substantive law (Opp. at 4, *citing* 42 U.S.C. §§ 2014(hh)) and, in some instances, may be litigated in state courts (Opp. at 5). The first point materially mischaracterizes Price-Anderson, which -- as a matter of *federal* law -- simply borrows elements of state law and, within that regime, makes the borrowed state rules subservient to the substantive, procedural, and remedial rules of Price-Anderson itself. 42 U.S.C. § 2014 (hh) (state law does not apply to the extent "inconsistent with the provisions of [this Act]"). Thus, Price-Anderson claims are federal causes of action and governed fundamentally by federal law.[3/] Given that Price-Anderson allows only "the law of the *State*" where the tort occurred to supplement federal law (42 U.S.C. § 2014(hh) (emphasis added)), the application of any *other* law, such as tribal law, is foreclosed.

Nor is it material that, in limited circumstances, a Price-Anderson claim may be litigated in state courts. Such instances will be rare, because Price-Anderson includes an absolute right of removal from state to federal court (42 U.S.C. § 2210(n)(2)), as well as provisions under which the Nuclear Regulatory Commission or the Department of Energy may "take charge of [an] action" and -- even over objection of the parties -- obtain its removal where a federal indemnity claim is at issue. *Id.* §§ 2210(h) & 2210(n)(2). But most importantly, even if a case remains in state court because no one requests removal, the substantive and remedial federal-law

---

[3/] *See, e.g., TMI*, 940 F.2d at 851-60 (Price-Anderson claims are federal causes of action within the federal-law jurisdiction of Article III courts); *Roberts v. FPL*, 146 F.3d at 1308 ("federal [and not state] safety regulations conclusively establish the duty of care owed in a public liability action"); *O'Conner*, 13 F.3d at 1100 (Price-Anderson "create[d] a new and entirely federal cause of action") & 1105 ("application of something other than the federal safety regulations as a standard of care [in a nuclear tort suit] is inconsistent with the Price-Anderson scheme").

provisions of Price-Anderson will govern nonetheless. *Id.* § 2014(hh). For example, federal safety standards -- rather than state tort theories -- would define the relevant standard of care. *See* note 3 *supra*.

Price-Anderson therefore makes clear that respondents' tribal-law claims do not and cannot exist as substantive causes of action. A requirement that those preempted claims be exhausted "would serve no purpose other than delay" (*Strate*, 117 S. Ct. at 1416 n.14) and indeed would border on harassment (*see National Farmers Union Ins. v. Crow Tribe*, 471 U.S. 845, 856 n.21 (1985)). As Judge Kleinfeld observed in his dissent: "There can be no claim for which exhaustion in tribal court can be required." Pet. App. at 22a.

2. Respondents argue that "well-established principles of federal law hold that Indian tribes cannot be divested of jurisdiction in the absence of an express and specific Congressional enactment." Opp. at 5. However, Price-Anderson *is* both express and specific in providing that all nuclear tort clams in the United States are to be governed by that statute. Claims under tribal law need not be singled out independently, for "it is now well settled . . . that a general statute in terms applying to all persons includes Indians and their property interests." *Federal Power Comm'n v. Tuscarora Indian Nation*, 362 U.S. 99, 116 (1960).[4/]

[4/] *See also Reich v. Mashantucket Sand & Gravel*, 95 F.3d 174, 179 (2d Cir. 1996) ("tribal power, even regarding exclusively internal conflicts, may be limited by treaty or federal statute, . . . including statutes that are silent as to Indians"); *Lazore v. C.I.R.*, 11 F.3d 1180, 1188 (3d Cir. 1993) (rejecting Indian's claim to tax exemption based on "the since-discredited rule that general acts do not apply to Indians in the absence of a clear Congressional intent to the contrary"); *Lumber Indus. Pension Fund v. Warm Springs Forest Prods. Indus.*, 939 F.2d 683 (9th Cir. 1991) (ERISA applies to tribal entities notwithstanding absence of explicit congressional directive); *U.S. Dep't of Labor v. OSHRC*, 935 F.2d 182 (9th Cir. 1991) (OSHA applies to tribal entities notwithstanding absence of explicit (continued...)

The phrase in *National Farmers Union* used to identify one exception to the tribal-exhaustion doctrine -- "violative of express jurisdictional prohibitions" (471 U.S. at 856 n.21) -- does not imply that Price-Anderson must explicitly reference tribal courts. A central holding of *Strate* was that the tribal-exhaustion principles of *National Farmers Union* and its progeny do not expand a tribe's limited substantive authority to regulate the conduct of nonmembers (117 S. Ct. 1410 & 1413), and in no event can a tribe's adjudicatory jurisdiction exceed its regulatory jurisdiction (*id.*). The *Strate* Court also made clear that the three exceptions to tribal exhaustion identified in *National Farmers Union* were not all-inclusive (*id.* at 1416 n.14[5/]) and that any otherwise applicable exhaustion requirement must yield where (as here) the tribe lacks regulatory jurisdiction over the subject of the dispute (here, nuclear safety) and, as a consequence, also lacks adjudicatory jurisdiction. *Id.* Respondents' opposition ignores both this clarification of *National Farmers Union* and Price-Anderson's express preemptive effect.

3. Like the panel majority below, respondents seek to limit *Strate* to its particular facts. They argue that its teachings are confined to the situation where tribal legislative

---

[4/](...continued)

congressional directive); *Blue Legs v. B.I.A.*, 867 F.2d 1094, 1097-98 (8th Cir. 1989) (RCRA's provision that "[a]ny action" be brought in federal court precludes tribal-court jurisdiction and obviates any exhaustion requirement).

[5/] The Ninth Circuit belatedly recognized this fact in its order amending its original opinion. Pet. App. at 25a (adding a fourth exhaustion exception on the basis of *Strate*, although misstating the scope of that exception).

jurisdiction is wanting because of *territorial* considerations[6/] rather than for some other reason. Opp. at 14-15. There is no principled basis for this limitation. A tribe's regulatory authority over nonmembers is subject to both territorial and substantive limitations,[7/] and Congress has broad authority to adjust either parameter. If, for example, Congress were to legislate that Indian tribes could not regulate marriages or divorces involving nonmembers (even those residing in a reservation), it would be folly to conclude that *Strate* was inapplicable and that tribal court proceedings had to be exhausted in a divorce dispute between nonmembers when Congress had clearly preempted the application of tribal law.

Likewise here, Congress has decided that only federal law should govern issues of nuclear safety, and that any tort claims arising from nuclear-related activities should be governed by a federal-law regime (which in turn borrows certain state but not tribal substantive rules). Accordingly, *Strate* is directly applicable: tribes lack regulatory jurisdiction over the subject matter of nuclear torts, and hence they lack adjudicatory authority. And, under another *Strate* holding equally applicable here, the doctrine of exhaustion of tribal remedies must therefore give way.

[6/] The highway right-of-way in *Strate*, although inside a reservation, had been transferred to State control. The mine sites here, while on reservation land leased from the Navajo Nation, were operated under federal license and contracts.

To clarify the facts here, El Paso's subsidiary (but not El Paso itself) operated several such mine sites between 1956 and 1959. *See* Pet. App. at 3a. The 1957-1968 dates stated at Pet. 2 reflect respondents' allegations in tribal court, but not findings of fact.

[7/] For example, tribes lack sovereign authority to exercise criminal jurisdiction over nonmembers, even for crimes committed on reservation land. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978).

4. Finally, respondents attempt to defend the Ninth Circuit panel's *sua sponte* assertion of jurisdiction over an injunctive order from which respondents neither appealed nor cross-appealed. Opp. at 15-17. Each of the cases that respondents cite are inapposite for each involved appellate disposition of an order that had been properly appealed; appellate jurisdiction was not even an issue. Here, on grounds of "comity," the Ninth Circuit purported to take jurisdiction over an unappealed injunction. As demonstrated in our petition (Pet. at 16-18), such action was contrary to well-established precedents.

B. Review by this Court Is Necessary and Warranted.

The divided Ninth Circuit panel failed to honor a congressional mandate that nuclear torts be subject exclusively to a federal regime, brushed aside the rulings of other circuits on the preemptive effect of Price-Anderson, imposed a tribal-exhaustion requirement against nonmembers in circumstances where exhaustion will serve no purpose other than delay, distinguished *Strate* by shoe-horning it into a narrow and illogical box, and created a new and dangerous theory that "comity" considerations justify the assertion of appellate jurisdiction over unappealed orders. These are significant issues, implicating the effectiveness of the Price-Anderson Act, the impact of the tribal-exhaustion doctrine, and the clarity of heretofore unambiguous principles of appellate jurisdiction.

Respondents assert that, nonetheless, certiorari should be denied because the tribal-exhaustion issue is similar to that presented in *Kerr-McGee v. Farley*, for which certiorari to the Tenth Circuit was denied last Term. Opp. at 3-4. But, the fact that the errors of *Farley* have now spread to the Ninth

Circuit is hardly an argument for inaction.[8/] The problem is recurrent, with additional suits in tribal court expected to be filed. More broadly, the Ninth and Tenth Circuits continue to apply a rigid exhaustion requirement uncalled for by this Court's opinions and contrary to the holdings of *Strate*.

Also unpersuasive is respondents' argument (Opp. 6-7) that ultimately, after years of litigation in tribal courts, the federal courts will have a second opportunity to consider whether the tribal claims were indeed preempted. Even assuming that the federal courts ultimately will have an unconstrained opportunity to assess the correctness of tribal-court judgments dealing with nuclear torts (at that time, respondents undoubtedly will argue for a very limited federal-court role), prolonged and expensive litigation would nonetheless have occurred, and petitioners (nonmembers of the tribe) would have been subjected to tribal adjudication of tribal-law claims without any timely federal-court resolution of the threshold issues of jurisdiction and the preemptive effect of Price-Anderson. Congress' objective "to effect uniformity, equity, and efficiency" in resolving nuclear tort litigation (*TMI*, *supra*, 940 F.2d at 857) would have been frustrated, and the proper bounds of tribal jurisdiction over nonmembers would have been breached.

[8/] As previously noted, moreover, the Tenth Circuit took a more defensible approach than has the Ninth as to the substantive scope of Price-Anderson. *See* note 2 *supra*.

CONCLUSION

Accordingly, the petition for a writ of certiorari should be granted.

Respectfully submitted,

Lynn H. Slade
Walter E. Stern
MODRALL, SPERLING
ROEHL, HARRIS &
SISK, P.A.
500 Fourth Street N.W.
Nations Bank Tower,
Suite 1000
Albuquerque, NM 87103
(505) 848-1800

Tom Galbraith
LEWIS & ROCA
40 North Central Avenue
Phoenix, AZ 85004
(602) 262-5311

James R. Atwood*
Richard A. Meserve
COVINGTON & BURLING
1201 Pennsylvania Ave. N.W.
P.O. Box 7566
Washington, D.C., 20044-7566
(202) 662-6000

Attorneys for Petitioners

* Counsel of Record

September 1998

Supreme Court, U.S.
FILED
NOV 25 1998
CLERK

(13)

No. 98-6

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1998

EL PASO NATURAL GAS COMPANY; CYPRUS FOOTE MINERAL COMPANY; AND CYPRUS AMAX MINERALS COMPANY,

PETITIONERS,

v.

LAURA NEZTSOSIE; ARLINDA NEZTSOSIE; AND ZONNIE MARIE DANDY RICHARDS, INDIVIDUALLY AND AS REPRESENTATIVE OF THE ESTATE OF HAROLD J. RICHARDS, SR.,

RESPONDENTS.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

JOINT APPENDIX

James R. Atwood*
COVINGTON & BURLING
1201 Pennsylvania Ave., N.W.
P.O. Box 7566
Washington, D.C., 20044-7566
(202) 662-6000

Attorneys for Petitioners

Seth Richard Lesser*
BERNSTEIN LITOWITZ BERGER
& GROSSMAN LLP
1285 Avenue of the Americas
New York, New York
(212) 554-1400

Attorneys for Respondents

* Counsel of Record

PETITION FOR A WRIT OF CERTIORARI FILED JUNE 26, 1998
CERTIORARI GRANTED OCTOBER 13, 1998

102 pp

TABLE OF CONTENTS

Page

List of Relevant Docket Entries 1a

Complaint for Injunctive Relief and Declaratory Judgment, *El Paso Natural Gas Co. v. Neztsosie* (U.S.D.C. D. Arizona) (Jan. 5, 1996) 11a

Verified Complaint, *Neztsosie v. Rare Metals Corp.* (Court of the Navajo Nation, District of Tuba City, Arizona) (Apr. 20, 1995) 18a

Complaint, *Cyprus Foote Mineral Co. v. Richards* (U.S.D.C. D. Arizona) (June 25, 1996) 28a

Exhibit A: First Amended Verified Complaint, *Richards v. Texas Zinc, et al.* (Court of the Navajo Nation, District of Tuba City, Arizona) (Jan. 29, 1996) 39a

Exhibit B: Order Denying Motion To Dismiss, *Richards v. Texas Zinc, et al.* (Court of the Navajo Nation, District of Tuba City, Arizona) (Apr. 30, 1996) 61a

Transcript of Proceedings and Order, *El Paso Natural Gas Co. v. Neztsosie* (U.S.D.C. D. Arizona) (May 28 & Nov. 3, 1996) 68a

Order, *Cyprus Foote Minerals Co. v. Richards*, (U.S.D.C. D. Arizona) (Nov. 21, 1996) 72a

Opinion of the United States Court of Appeals for the Ninth Circuit (as amended Apr. 27, 1998) 74a

Order of the United States Court of Appeals for the Ninth Circuit Amending Opinion and Denying Petition for Rehearing En Banc (Apr. 27, 1998) 97a

RELEVANT DOCKET ENTRIES

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

No. CIV 96-0049-PCT-RGS

EL PASO NATURAL GAS COMPANY
v.
LAURA NEZTSOSIE and ARLINDA NEZTSOSIE

Date	No.	Description
1/5/96	1	COMPLAINT FILED (ms) [Entry date 01/10/96]
1/5/96	2	MOTION for preliminary injunction by pla El Paso Natural Gas [2-1] (ms) [Entry date 01/10/96]
1/5/96	3	STATEMENT OF FACTS by pla El Paso Natural Gas re motion for preliminary injunction by pla El Paso Natural Gas [2-1] (ms) [Entry date 01/10/96]
2/14/96	6	MOTION to dismiss plas complaint for injunctive relief and declaratory judgment by dft Laura Neztsosie, dft Arlinda Neztsosie [6-1] (tmc) [Entry date 02/10/96]

2/14/96	7	MEMORANDUM by dft Laura Neztsosie, dft Arlinda Neztsosie in support of dfts motion to dismiss plas complaint and in opposition to plas application for preliminary injunction [6-1], [2-1] (tmc) [Entry date 02/16/96]
3/8/96	10	SUPPLEMENTAL by dfts Brief in response to plas complaint for injunctive relief (tmc)
3/12/96	12	RESPONSE by pla El Paso Natural Gas to motion to dismiss plas complaint for injunctive relief and declaratory judgment by dft Laura Neztsosie, dft Arlinda Neztsosie [6-1] (tmc)
3/12/96	12	REPLY by pla El Paso Natural Gas to response to motion for preliminary injunction by pla El Paso Natural Gas [2-1] (tmc)
3/27/96	13	SURREPLY by pla El Paso Natural Gas to dfts' supplemental brief [10-1] (ms) [Entry date 03/28/96]
5/28/96	15	MINUTE ENTRY Judge Inits: RGS Crt Rptr: M. SANCHEZ granting in part motion to dismiss plas complaint for injunctive relief and declaratory judgment by dft Laura Neztsosie, dft Arlinda Neztsosie [6-1]. ORD denying in part motion for preliminary injunction by pla El Paso Natural Gas [2-1] FUR ORD that pltf post bond in the amount of $1,000. See transcript of details. [15] (qo) [Entry date 05/29/96]

11/6/96	29	ORDER by Judge Roger G. Strand: denying plas request for preliminary injunction and granting limited injunction; approving cash bond in the amount of $1,000.00 in support of this injunction pursuant to FRCP 65(c) (cc: all counsel) re: order [29-1] (tmc)
11/14/96	30	NOTICE of Preliminary Injunction Appeal by El Paso Natural Gas from District Court order [29-1] (cc: all counsel/9CCA/RGS (jw) [Entry date 11/15/96]

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

No. CIV 96-01524-PCT-RGS

CYPRUS FOOTE MINERALS COMPANY
v.
ZONNIE MARIE DANDY RICHARDS

Date	No.	Description
6/25/96	1	COMPLAINT FILED (ms) [Entry date 06/27/96]
6/25/96	2	MOTION for preliminary injunction by plas [2-1] (ms) [Entry date 06/27/96]
8/2/96	5	ANSWER by dft Zonnie Marie Dandy Richards (rew) [Entry date 08/07/96]
8/2/96	6	RESPONSE (Memorandum of points and authorities in support of dft's opposition) by dft Zonnie Marie Dandy Richards to motion for preliminary injunction by plas [2-1] (rew) [Entry date 08/07/96]
8/2/96	7	DECLARATION of David K Ringwood by dft Zonnie Marie Dandy Richards in support of response in opposition [6-1], re motion for preliminary injunction by plas [2-1] [2-1] (rew) [Entry date 08/07/96]

8/12/96	8	REPLY MEMORANDUM in support by all plas to response to motion for preliminary injunction by plas [2-] (rew) [Entry date 08/14/96]
11/26/96	10	ORDER by Judge Roger G. Strand granting in part and denying in part motion for preliminary injunction by plas [2-1]; cash bond approved in the amount of $1000.00 in support of this injunction pursuant to FRCvP 65(c) (cc: all counsel/finance) (rew) [Edit date 11/26/96]
11/27/96	11	NOTICE of Interlocutory Appeal by Cyprus Foote Mineral, Cyprus Amax Minerals from District Court order [10-1] (cc: 9CCA/cnsl/RGS) (rew) [Entry date 11/29/96]
11/27/96	12	NOTICE by all plas of filing cash bond in support of injunction (rew) [Entry date 11/29/96]

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 96-17121

EL PASO NATURAL GAS COMPANY
v.
LAURA NEZTSOSIE and ARLINDA NEZTSOSIE

No. 96-17139

CYPRUS FOOTE MINERALS COMPANY and
CYPRUS AMAX MINERAL COMPANY
v.
ZONNIE MARIE DANDY RICHARDS

Date	Description
11/26/96	DOCKET CAUSE AND ENTERED APPEARANCES OF COUNSEL, CADS SENT (Y/N): YES. Preliminary Injunction appeal. Briefing to be established pursuant to Cir. R. 3-3. CADS is past due; CADS must be filed no later than 12/3/96 for Christopher Robbins. [96-17121] (dl) [96-17121]
12/4/96	DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL. CADS SENT (Y/N): YES. Briefing to be established by MoAtt pursuant to Cir.R.3-3. This is an appeal from an order re: a Preliminary Injunction. [96-17139] (dl) [96-17139]

12/6/96	Filed aplts' joint motion to consolidate preliminary injunction appeals and to consolidate briefing schedules in 96-17121 & 96-17139; [96-17121] served on 12/5/96 to (MOATT). [3132999] (jr) [96-17121]
12/6/96	Filed aplts' joint motion to consolidate preliminary injunction appeals and to consolidate briefing scheduled in 96-17121 & 96-17139; [96-17139] served on 12/4/96 to (MOATT). [3133007] (jr) [96-17139]
12/16/96	Rec'd aplts' (El Paso Natural Gas, Cyprus Foote, et al) joint brief in 15 copies 21 pages & 5 excerpts of record in 2 volumes (Informal: no) deficient need motion to consolidate and corrected proof of service; served on 6/12/96. Notified csl. [96-17121, 96-17139] (jr) [96-17121 96-17139]
12/31/96	Filed order MOATT (SL) granting aplts unopposed joint motion to cons cases 96-17121 and 96-117139. The brfg schedule established in 96-17139 shall govern these cons appeals. Aplts jt brf, excerpts of record are due 12/26/96; aples' brf due 1/23/97; ROA is due 1/30/97; rpy brf is due 14 days from svc of the aples brf. [96-17121, 96-17139] (ot) [96-17121 96-17139]
1/8/97	Received Appellant El Paso Natural Gas in 96-17121, Appellant Cyprus Foote Mineral in 96-17139's satisfaction of (major) brief deficiency (amended proof of service of opening brief, served 12/13/96) (Inserted in brief) [96-17121, 96-17139] (em) [96-17121, 96-17139]

1/8/97 Filed original and 15 copies Appellant El Paso Natural Gas in 96-17121, Appellant Cyprus Foote Mineral in 96-17139, Appellant Cyprus Amax Minerals in 96-17139 opening brief (Informal: n) 21 pages and five excerpts of record in 2 volumes; served on 12/13/96 [96-17121, 96-17139] (em) [96-17121, 96-17139]

1/13/97 Filed original and 15 copies aples' joint 24 page brief; served on 1/9/97. [96-17121, 96-17139] (jr) [96-17121 96-17139]

1/29/97 Filed original and 15 copies aples' joint reply (Informal: no) 18 pages; served on 1/27/97. [96-17121, 96-17139] (jr) [96-17121, 96-17139]

5/5/97 ARGUED AND SUBMITTED TO Harry PREGERSON, Warren J. FERGUSON, Andrew J. KLEINFELD [96-17121, 96-17139] (mlm) [96-17121, 96-17139]

2/11/98 FILED OPINION: AFFIRMED in part, REVERSED in part, and REMANDED. (Terminated on the Merits after Oral Hearing; Affirmed (in part) and Reversed (in part); Written, Signed, Published. Harry PREGERSON, author; Warren J. FERGUSON; Andrew J. KLEINFELD, dissenting) FILED AND ENTERED JUDGMENT. [96-17121, 96-17139] (jr) [96-17121, 96-17139]

2/25/98 [3401655] Filed original and 40 copies Appellant Cyprus Foote Mineral and Cyprus Amax Minerals 96-17139 petition for rehearing with suggestion for rehearing en banc 16 p.pages, served on 2/24/98 (counsel to sent amended cert of service indicating

date) PANEL AND ACTIVE JUDGES [96-17139] (em) [96-17139]

2/25/98 [3402252] Filed original and 40 copies aplt's petition for rehearing with suggestion for rehearing en banc 19 pages; served on 2/25/98 to (PANEL & ALL ACTIVE JUDGES). [96-17121] (jr) [96-17121]

4/27/98 Filed order amending opinion and denying pet for rhrg en banc and amended opinion (Judges Harry PREGERSON, author, Warren J. FERGUSON, Andrew J. KLEINFELD, dissent) (Orig. opinion id: [3392495-1] in 96-17121, [3392495-1] in 96-17139) [3402252-1] in 96-17121, [3401655-1] in 96-17139 [96-17121, 96-17139] (gail) [96-17121 96-17139]

5/5/98 Filed aplts' motion to stay mandate pending filing of petition for writ of certiorari; [96-17121, 96-17139] served on 5/4/98 to (PREGERSON). [3445943] [96-17121, 96-17139] ORIGINAL & COPIES REC'D (hard copies) (jr) [96-17121 96-17139]

5/6/98 Filed aples' opposition to motion to stay mdt; served on 5/5/98 to (PREGERSON). [96-17121, 96-17139] (jr) [96-17121 96-17139]

6/12/98 Filed order (Harry PREGERSON) plaintiff-aplts' motion to stay the mandate pending petition for writ of certiorari is granted. [3445943-1] in 96-17121, 96-17139 [96-17121, 96-17139] (jr) [96-17121 96-17139]

7/6/98 Rec'd ntc from Supreme Court; petition for certiorari filed. Supreme Court No. 98-6; filed on 6/26/98 & placed on the dkt 6/29/98 [96-17121, 96-17139] (jr) [96-17121 96-17139]

10/16/98 Received notice from Supreme Court, petition for certiorari GRANTED on 10/13/98. Supreme Court No. 98-6 (PANEL) (sm) [96-17121 96-17139]

IN THE UNITED STATES DISTRICT COURT
IN AND FOR THE DISTRICT OF ARIZONA

EL PASO NATURAL GAS COMPANY,
a Delaware corporation,

Plaintiff,

v.

LAURA NEZTSOSIE and ARLINDA NEZTSOSIE,

Defendants.

No. CIV 96-0049-PCT-RGS

COMPLAINT FOR INJUNCTIVE RELIEF
AND DECLARATORY JUDGMENT

EL PASO NATURAL GAS COMPANY ("EPNG"), by and through counsel undersigned, states the following in support of its Complaint for Injunctive Relief and Declaratory Judgment:

JURISDICTIONAL ALLEGATIONS

I.

EPNG is a Delaware corporation, licensed to do business, and doing business, in the State of Arizona.

II.

Laura Neztsosie and Arlinda Neztsosie are enrolled members of the Navajo Indian Tribe and reside on the Navajo Nation Reservation near Tuba City, Arizona.

III.

This Court has jurisdiction over this dispute pursuant to 28 U.S.C. §§ 1331, 1332, 1337, and 2201, *et seq.* Furthermore, either the relief sought by Plaintiff herein is within the jurisdiction limits of this Court, or Plaintiff need not demonstrate adherence to any jurisdictional amount requirement under 28 U.S.C. § 1331. Finally, venue in this Court is appropriate as to all Defendants.

GENERAL ALLEGATIONS

IV.

Plaintiff incorporates Paragraph I through III of this Complaint as if fully set forth herein.

V.

From 1957 through 1968, EPNG, and its wholly-owned subsidiary, Rare Metals Corporation of America, Inc. ("RMCA"), which was subsequently merged into EPNG and ceased to exist in 1962, operated open-pit, class one uranium mines in the Cameron/Tuba City area.

VI.

At all times relevant hereto, these uranium mines and their remains were operated and maintained properly, pursuant to all necessary licenses and permits, and in

conformance with requirements imposed by all appropriate regulatory authorities, including the Navajo Nation, the United States Atomic Energy Commission, the United States Nuclear Regulatory Commission, and the Arizona Atomic Energy Commission.

VII.

Throughout the time that EPNG and RMCA operated the uranium mines, they sold to the United States Atomic Energy Commission all of the uranium concentrate mined, produced, processed, and ultimately milled, as a result of uranium mining activities, pursuant to their operations licenses with the United States Atomic Energy Commission. Accordingly, all of EPNG's activities at the mine sites, and their surrounding areas, were performed pursuant to an exclusive contract with the United States government.

VIII.

On April 20, 1995, Defendants Neztsosie filed a Complaint against EPNG and its former defunct subsidiary, RMCA, in the Navajo Tribal Court, Tuba City District. (TC-CV-0052-95)

IX.

The Complaint filed by Defendants Neztsosie alleges that water collected in the Cameron mine pits, as a result of uranium mining activities, was consumed by Laura and Arlinda Neztsosie, and their livestock. Defendants Neztsosie further allege that the same water also was used for swimming, bathing, and washing clothes.

X.

The Neztsosie Defendants claimed that radioactive substances gradually were released into the water, the surrounding soil and the ambient air as a result of uranium mining activities. Further, the Neztsosie Defendants assert that, as a result of this alleged contamination, they have suffered radioactive and heavy metal poisoning throughout their lifetimes. The Neztsosies' Complaint states causes of action for negligence, strict liability based upon abnormally dangerous activities, outrageous conduct, misrepresentation, and fraud, all allegedly due to uranium mining activities. The Neztsosie Defendants seek compensatory and punitive damages against EPNG as a result of the described uranium mining activities.

XI.

For its Answer to the Neztsosies' Complaint in the Navajo Tribal Court, EPNG affirmatively alleges that the Navajo Tribal Court lacks subject matter jurisdiction to hear this case.

FIRST CAUSE OF ACTION
(Request for Declaratory Relief)

XII.

Plaintiff incorporates Paragraphs I through XI of this Complaint as if fully set forth herein.

XIII.

As there is a dispute regarding the substantial federal question of whether the Navajo Tribal Court has subject matter jurisdiction over the Neztsosies' personal injury

claims under the present circumstances, there is a justifiable controversy between these parties pursuant to 28 U.S.C. § 2201 *et seq.*

XIV.

Because the activities and resulting damages alleged in the Neztsosies' Complaint in the Navajo Tribal Court involved the mining, processing, milling and production of uranium pursuant to an exclusive contract with the United States government, as well as the comprehensive laws of the United States, there exist overriding federal interests in this matter such that the exercise of tribal jurisdiction over EPNG and the subject matter of the Neztsosies' Complaint would be inconsistent with these overriding federal interests.

WHEREFORE, Plaintiff EPNG prays this Court to enter judgment for declaratory relief in its favor as follows:

A. That the Navajo Tribal Court has no jurisdiction over EPNG or the subject matter of the Neztsosies' pending Complaint in the Navajo Tribal Court;

B. For Plaintiff's reasonable costs incurred herein; and

C. For such other and further relief as the Court may deem just and proper under the circumstances.

SECOND CAUSE OF ACTION
(Request for Injunctive Relief)

XV.

Plaintiff incorporates Paragraphs I through XIV of this Complaint as if fully set forth herein.

XVI.

Due to the content and nature of the Neztsosies' allegations currently pending against EPNG in the Navajo Tribal Court, EPNG has suffered, and continues to suffer, immediate and irreparable harm.

XVII.

As a result of EPNG's necessary efforts to defend itself against the Neztsosies' allegations in a tribal forum that has no jurisdiction to hear this matter, EPNG has suffered and continues to suffer immediate and irreparable harm.

XVIII.

The Neztsosie Defendants' past and continuing conduct in asserting the underlying personal injury claims against EPNG in the Navajo Tribal Court have caused extreme prejudice to EPNG, and is in direct violation of the rights of EPNG.

WHEREFORE, Plaintiff EPNG prays that this Court grant its request for injunctive relief as follows:

A. A preliminary injunction and permanent injunction barring the Neztsosie Defendants from maintaining their underlying personal injury Complaint against EPNG, and any of its subsidiaries, in the Navajo Tribal Court, inasmuch as the Navajo Tribal Court possesses no jurisdiction to hear that matter;

B. EPNG's reasonable costs incurred in pursuit of injunctive relief; and

C. For such other and further relief as the Court may deem just and proper under the circumstances.

RESPECTFULLY SUBMITTED this 5th day of January, 1996.

O'CONNOR, CAVANAUGH, ANDERSON, WESTOVER, KILLINGSWORTH & BERESHEARS

By: _____
Richard J. Woods
Troy B. Froderman
Eric A. Mark

Attorneys for Plaintiff

and

Jamye Boone Ward, Co-Counsel for Plaintiff

IN THE COURT OF THE NAVAJO NATION
DISTRICT OF TUBA CITY, ARIZONA

LAURA NEZTSOSIE and ARLINDA NEZTSOSIE,

Plaintiffs,

vs

RARE METALS CORPORATION and
EL PASO NATURAL GAS CORPORATION, and
all affiliates and assignees thereof,

Defendants.

VERIFIED COMPLAINT

COMES NOW PLAINTIFFS, ARLINDA NEZTSOSIE AND LAURA NEZTSOSIE, by and through their attorney, Cherie V. Daut, and file the following Complaint:

JURISDICTION AND VENUE

1. Jurisdiction of this matter lies in the Navajo Nation Court, Tuba City District, according to 7 N.T.C. 253(5), 7 Navajo Tribal Code section 133 (a,b,c,d,e), 7 Navajo Tribal Code section 254, 7 Navajo Tribal Code section 302, 7 Navajo Tribal Code section 6030610, 7 Navajo Tribal Code section 651, Title 7 Navajo Tribal Code Section 602(a)(1), all of which provide for original jurisdiction in the Tribal Courts of the Navajo Nation.

2. All Plaintiffs are Navajo Indians, all of Defendants acts and emission took place solely on the Navajo Nation Reservation. Venue in proper in Tuba City since all transactions and occurrences took place in the Cameron and Tuba City, Arizona areas, and is based on the current location and convenience of the Plaintiffs.

3. Defendants or their affiliates or assignees, owned and operated open pit uranium mines in the Cameron/Tuba City area (Cameron mines) from approximately 1950 to 1965. The Cameron mines were left open and uncovered by Defendants during the mining operations and upon the termination of Defendant's uranium mining activities the Cameron mines remained open and uncovered for many years.

4. Due to Defendants operation of the Cameron mines the resultant open mining pits served as large collecting areas for water which would have otherwise been scarce in the Cameron/Tuba City arid climate.

5. Plaintiffs utilized the water which collected in the Cameron mine pits, which were created by Defendants mining operations, for drinking, bathing, swimming, clothes laundering and stock watering, and as a result, Plaintiffs were exposed to vast quantities of radioactive and non-radioactive substances which were released into the Cameron mine water and surrounding areas.

6. Defendants operation of the Cameron mines also introduced and released otherwise unoxidated uranium into the water table from which plaintiffs utilized well water for drinking, bathing, swimming, clothes laundering and stock watering.

7. Defendants operation of the Cameron mines has caused Plaintiffs to suffer severe injuries and damages, including severe health effects, emotion distress, annoyance and discomfort, severe physical and mental impairment and disability and fear of death, and as a result Plaintiffs have incurred medical expenses, decreased earning capacity, pain, suffering, loss of enjoyment of life and other past, present and future economic and non-economic damages.

FIRST CLAIM FOR RELIEF - NEGLIGENCE

8. Plaintiffs repeat the allegation which are contained in paragraphs 1 through 7 and incorporate them by reference herein:

9. Plaintiffs Laura Neztsosie and Arlinda Neztsosie have at all times lived in the Cameron Mines area. At all times relevant hereto, Defendants operated the Cameron Mines, where Defendants mined, accumulated, handled uranium ore.

10. Defendants knew or should have known that the hazardous materials which were generated from the mining of uranium ore constituted a grave risk to the health of persons who might have come in contact with it, including the Plaintiffs, and that care and caution should have been exercised in the handling of such materials.

11. As a direct and proximate result of the Defendants' failure to properly, safely and adequately contain and handle uranium ore and uranium mining waste, the mining waste has migrated off-site where it has entered the ground and surface water which is, and has been, utilized by the Plaintiffs.

12. Uranium and uranium mining waste continues to leave the Cameron mine sites which were created by Defendants and are a continuing and ongoing source of contamination to water, land and air, as well as to animals (sheep and cattle) which are owned and consumed by Plaintiffs.

13. Defendants owed a duty to Plaintiffs to use reasonable care in the handling and disposal of the hazardous radioactive and toxic materials which were produced as a result of their creation and operation of the Cameron uranium mines.

14. Defendants negligently caused or permitted radioactive and toxic emission to be released from the Cameron uranium mines. These emissions were regularly carried by ground water and soil and contaminated the properties and air where Plaintiffs resided.

15. Defendants also negligently failed to warn Plaintiffs of the potential for leakage and actual leakage of the hazardous radioactive and toxic materials into the air, ground water and soil in the vicinities of the Cameron uranium mines.

16. As a direct and proximate result of Defendants' breach of duty, Plaintiffs sustained severe injuries and losses, including but not limited to emotion distress and fear, severe physical injury, loss of enjoyment of life, and economic and non-economic losses.

17. Defendants breached their duty to Plaintiffs by failing to properly control and contain the radioactive and/or hazardous materials which were produced by Defendants mining activities at the Cameron mines, by negligently releasing the radioactive and/or hazardous materials into the air and allowing radioactive materials to

migrate or leach into the ground water, surface water, rivers and soil in the vicinity.

18. These releases and contamination of the air, ground water, surface water, rivers and soil in the vicinity of the Cameron mines were proximately caused by Defendants and the results were aggravated by the negligent acts and/or emissions of the Defendants including, but not limited to, the following:

(A) permitting the emissions, releases and leaks of radioactive and/or hazardous materials from the Cameron mines to occur;

(B) failing to determine where and how the emissions, releases and leaks of radioactive and/or hazardous materials occurred and in failing to correct the problems to prevent further leakage and emissions:

(C) failing to provide adequate containment of the radioactive and/or hazardous material;

(D) failing to provide adequate air, surface water, ground water, rivers and soil sampling and/or monitoring to detect releases of radioactive and/or hazardous materials;

(E) failing to take proper measurements of particle sizes and emissions;

(F) failing to test uranium ores adequately for the presence of hazardous or toxic materials;

(G) failing to timely and adequately warn or otherwise notify Plaintiffs of such contamination and to prevent recurring releases:

(H) failing to take timely and adequate remedial actions to contain and clean-up such contamination and to prevent recurring releases;

(I) failing to properly train and supervise Defendants employees to insure that the necessary safeguards and procedures would be followed in the event that any emissions, releases or leaks of radioactive and/or hazardous materials from the Cameron mines and properties might occur:

(J) failing to comply with applicable Navajo Tribal laws;

(K) completely failing to construct and implement remedial measures for containing radioactive and heavy metal releases from the open pit mines and uranium tailing areas of the Cameron mines. As a direct and proximate result of Defendant's conduct, Plaintiffs sustained severe injuries and damages.

SECOND CLAIM FOR RELIEF
ABNORMALLY DANGEROUS ACTIVITY - STRICT LIABILITY

19. Plaintiffs repeat the allegations which are contained in Paragraphs 1 through 18 and incorporate them by reference herein.

20. Defendants operated the Cameron mines in a manner that created emissions containing high concentrations of radioactive materials and toxic metals including but not limited to the following: uranium, copper, manganese, magnesium, molybdenum, sodium, chloride, sulfate, fluoride, silica, barium, beryllium, cadmium, chromium, cobalt, iron, lead, nickel, silver, strontium, vanadium, zinc, aluminum,

lithium, radium 226, uranium 238, uranium 234, uranium 235, radon 228, radon222, selenium, plutonium, lanthandies including cerium, luropium, lanthium, gallium, thorium, arsenic, mercury, and nitrates, as well as alpha, beta and gamma radiation, and other radioactive and toxic chemicals and particularities which is, as such, as a non-natural use of land and as such, constitutes an abnormally dangerous activity which created risks to Plaintiffs and others.

21. Defendant's open pit mining of radioactive and non radioactive hazardous substances as indicated in Paragraph 20 supra is an abnormally dangers activity or ultra hazardous activity, i.e., one which necessarily involves a risk of serious harm to the person, land or chattels of others which cannot be eliminated by the exercise of the utmost care and is not a matter of common usage.

22. Defendants area strictly liable to Plaintiff for all damages and injuries which have resulted and will result from the open pit mining of radioactive and non-radioactive hazardous substances as indicated in Paragraph 20 supra at the Cameron uranium mines.

23. Defendants' open pit mining of radioactive and non radioactive materials at the Cameron uranium mines have directly and proximately caused releases of such substances into the environment surround the Cameron uranium mines. As a direct and proximate result of Defendant's operation of the Cameron uranium mines in the aforesaid manner, Plaintiffs suffered the aforementioned injuries and damages to themselves for which Defendants are strictly liable.

THIRD CLAIM FOR RELIEF
OUTRAGEOUS CONDUCT

24. Plaintiffs repeat the allegations which are contained in Paragraphs 1 through 23 and incorporate them by reference herein.

25. The actions and inactions of Defendants complained of herein are so outrageous in character and so extreme in degree as to compel a reasonable person in the Navajo community to declare the same as atrocious, beyond all bounds of decency, and utterly intolerable in a civilized Navajo community.

26. As a direct and proximate result of the above conduct, Plaintiffs have suffered severe emotional distress and have injured and damaged as alleged herein.

FOURTH CLAIM FOR RELIEF:
MISREPRESENTATION/FRAUD AND DECEIT

27. Plaintiffs repeat the allegation which are contained in Paragraphs 1 through 26 and incorporate them by reference.

28. Defendants failed, both negligent and intentionally, to disclose to Plaintiffs, material facts which were known concerning the nature, magnitude and effects of the releases of the exposure to radioactive and other hazardous substances which were produced by Defendant's open pit mining operations at the Cameron mines.

29. Defendants knew of and concealed, misrepresented and failed to disclose the true facts which the intention of creating a false impression of the actual facts in the minds of Plaintiffs, and with the intent that Plaintiffs be

lulled into complacency and refrain from seeking redress or pursuing remedial action due to the development of Plaintiffs' severe physical injuries.

30. Plaintiffs reasonably believe Defendants' misrepresentation and relied upon the same in refraining until the present from seeking redress of pursuing remedial action. As a direct result of Defendants' negligent and/or intentionally false and deceptive representations and Plaintiff's reasonable relief of and reliance thereon, many of the injuries and damages to Plaintiffs arising out of the releases of hazardous substances into the environment were compounded by the passage of time and direct, daily exposure of Plaintiffs to same.

31. As a direct and proximate result of the above conduct, Plaintiffs have been injured and damaged as alleged herein.

FIFTH CLAIM FOR RELIEF:
EXEMPLARY DAMAGES AGAINST ALL DEFENDANTS

32. Plaintiffs repeat the allegations which are in Paragraph 1 through 31 above and incorporates them by reference herein.

33. The actions of Defendants complained of herein were attended by circumstances of fraud, malice, and insult, and the wanton and reckless disregard for Plaintiffs health and well being to and award of exemplary damages.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs prays that judgment be entered in their favor and against Defendants for

compensatory damages, consequential damages, special damages and exemplary damages, reasonable costs and expenses associated with this litigation, including attorney's fees and such other and further relief as this Court deems just and proper.

Cherie V. Daut,
Attorney for Plaintiffs'
Laura Neztsosie and
Arlinda Neztsosie
P.O. Box 1357
Shiprock, New Mexico 87420
(505) 368-5878
and
Rebecca Lorenz
Attorney at Law
Melat, Pressman, Ezell and Higby
Attorney at Law
711 South Tejon
Colorado Springs
CO 80903

[April 20, 1995]

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

CYPRUS FOOTE MINERAL COMPANY,
a Pennsylvania corporation;
CYPRUS AMAX MINERALS COMPANY,
a Delaware corporation,

Plaintiffs,

vs.

ZONNIE MARIE DANDY RICHARDS,
individually and as representative of the
Estate of Harold J. Richards, Sr.,

Defendants.

No. 96-1524-PHX-RGS

COMPLAINT

I. GENERAL DESCRIPTION OF THE ACTION

1. This is an action by which plaintiffs Cyprus Foote Mineral Company and Cyprus Amax Minerals Company (collectively, "Cyprus") seek declaratory and injunctive relief to bar the prosecution of a lawsuit entitled *Zonnie Marie Dandy Richards (The Estates of Harold J. Richards, Sr., Deceased) v. Texas Zinc, Vanadium Corporation of America, Atlas Corporation, and all affiliates, joint venturers and assignees thereof*, pending in the District Court of the Navajo Nation, Kayenta District, ("Navajo Tribal Court"), No. KY-CV-002-95 (the "Tribal Court Suit"). The Tribal Court Suit

is "patently violative of express jurisdictional prohibitions" established by the Price Anderson Act, as amended, 42 U.S.C. § 2210 *et seq.*, and the exclusive federal control of the entire field of nuclear safety.

II. THE PARTIES

2. Cyprus Foote Mineral Company is a corporation organized and existing under the laws of the State of Pennsylvania with its principal place of business in Kings Mountain, North Carolina. Cyprus Amax Minerals Company is a corporation organized and existing under the laws of the State of Delaware with its principal place of business in Denver, Colorado. Cyprus Amax Minerals Company is the parent of Cyprus Foote Mineral Company. Cyprus is the successor by merger of Vanadium Corporation of America ("VCA") and Foote Mineral Company ("Foote"). Under AEC Source Material License No. SUA-547, VCA operated the Monument No. 2 uranium mine and concentrator from approximately 1943 through 1967. In 1967, VCA was merged with Foote. The Monument No. 2 facility was closed during or shortly before 1969.

3. Defendant Zonnie Marie Dandy Richards, individually and as representative of the Estate of Harold J. Richards, Sr. ("Richards"), is a member of the Navajo Nation and upon information and belief resides on that portion of the Navajo Nation within the borders of the State of Arizona. On or about March 29, 1995, Richards filed the Tribal Court Suit against "Texas Zinc, Vanadium Corporation of America, Atlas Corporation, and all affiliates, joint venturers and assignees thereof." On information and belief, the Cyprus defendants, as successor to VCA, are the only defendants to have been served with process in the Tribal Court Suit. On January 29, 1996, Richards filed a First Amended Verified Complaint in

the Tribal Court Suit, a copy of which is attached as Exhibit A.

III. JURISDICTION AND VENUE

4. This Court has jurisdiction of this action under 28 U.S.C. § 1331 in that this is an action arising under the Constitution, laws or treaties of the United States, particularly Art. I, § 8 and Art. VI, clause 2 of the Constitution of the United States. Jurisdiction is also conferred by 42 U.S.C. § 2210(n)(2) of the 1988 Amendments; 28 U.S.C. § 1332 (diversity of citizenship, and the amount in controversy exceeds $50,000, exclusive of interest and costs), and 28 U.S.C. § 1337 (Acts of Congress regulating commerce).

5. Venue is proper in this District pursuant to 28 U.S.C. § 1391(b) in that defendants reside in this District and a substantial part of the events or omissions giving rise to the plaintiffs' claims occurred in this District. Venue is also conferred by 42 U.S.C. § 2210(n)(2) in that defendants' Tribal Court Suit claims for "public liability" arising out of a "nuclear incident" occurred in this District.

IV. FACTUAL BACKGROUND

6. During World War II, the Manhattan Engineering District ("MED"), under the Army Corps of Engineers, was charged with the development of nuclear weapons. By August 1, 1946, when the first Atomic Energy Act was signed into law, the MED had over 5000 military and civilian employees and was administering contracts involving a total work force employing more than 50,000 people. The MED's activities included research and development, engineering and design, the operation of production facilities for weapons materials and components, and the acquisition of

uranium, the basic raw material essential to the production of nuclear weapons. All of the MED functions were transferred to the AEC by Executive Order No. 9816, effective December 31, 1946. The AEC was established by the Atomic Energy Act of 1946 (Pub.L. No. 79-585, 60 Stat. 755).

7. At the end of World War II, uranium production in the United States was practically nonexistent and the nation was dependent on small and unreliable foreign supplies of uranium. Responding to urgent military requirements, the AEC in 1947 instituted the Domestic Uranium Procurement Program ("the Procurement Program"). The Procurement Program was designed to create a domestic mining and milling industry to provide uranium concentrate for the government's vital nuclear weapons program. The Procurement Program was designed to fulfill the "paramount objective of assuring the common defense and security" set forth in the Atomic Energy Act of 1946. The Director of the Procurement Program has stated that "[n]o single material ever has been so essential to our safety, or even to our survival, as uranium."

8. Both the Atomic Energy Acts of 1946 and 1954 (42 U.S.C. § 2210 *et. seq.*) provided that the federal government would be the sole owner of uranium products. Moreover, at all times material hereto, the AEC exercised and maintained complete control over the uranium mining and milling industry through regulation, licensing, contractual requirements, construction requirements and administrative and safety control measures. *See e.g.* 10 CFR parts 20 and 40. The control of the federal government over the entire field of nuclear materials has been described as "unique," "absolute" and "exclusive."

9. In order to obtain supplies of uranium concentrate for the nuclear weapons program and to assure the

development of a domestic uranium industry, the AEC entered into contracts with several different companies, including VCA, calling for the construction and operation of uranium mills. These AEC contracts typically contained terms specifying where and when the uranium mills would be built, how they would be built, what their capacities would be, how much ore would be processed quarterly, how the uranium concentrate would be verified, sampled, assayed and packaged, from whom and where the company could purchase ore, and for how much the concentrate would be sold to the AEC.

10. Under AEC Source Material License No. SUA-547, VCA mined uranium at the Monument No. 2 mine, located in Cane Valley, Arizona. On information and belief, prospecting began at that site in approximately 1943. During the mid-1960's, the grade of uranium ore extracted from the Monument No. 2 mine became lower. Thus, pursuant to AEC specifications and instructions, VCA constructed the Monument No. 2 concentrator, which concentrated the uranium ore before shipping for further milling at VCA's Naturita and Durango, Colorado mills, and after 1963, at VCA's mill in Shiprock, New Mexico. The remnants of the ore concentrating process consisted of sand-like particles known as uranium tailings. These tailings were stored on a tailings pile on land adjacent to the concentrator and mine. In 1954, Congress made a finding that "byproduct material" is to be regulated "in the national interest." 42 U.S.C. § 2012(d). Uranium tailings are "byproduct material." 42 U.S.C. § 2014(e).

(2) The Price-Anderson Act and the 1988 Amendments

11. In 1957, Congress passed the Price-Anderson Act to address liability and compensation for damages and

injury which might be occasioned by the atomic energy program.

12. As amended in 1988, the Price-Anderson Act provides for federal jurisdiction over "public liability action[s]." The term "public liability action" means "any suit asserting public liability." 42 U.S.C. § 2014(hh). "Public liability" means "any legal liability arising out of or resulting from a nuclear incident or precautionary evacuation." 42 U.S.C. § 2014(w). "Nuclear incident" means "any occurrence, including an extraordinary nuclear occurrence, within the United States causing bodily injury, sickness, disease or death, or loss of or damage to property, or loss of or use of property, arising of or resulting from the radioactive, toxic, explosive or other hazardous properties of source, special nuclear or byproduct material." Id. § 2014(q). "Source material" includes the uranium ore mined at the Monument No. 2 mine. "Byproduct material" includes uranium mill tailings. 42 U.S.C. § 2014(e)(2).

13. A "nuclear incident" may be sudden and accidental or occur over a long period of time. S.Rep. No. 296, 85th Cong., 1st Session 16, reprinted in 1957 U.S. Code Cong. & Admin. News 1803, 1817.

14. The Price-Anderson Act, as amended, establishes a federal cause of action for radiation injuries, establishes federal jurisdiction over that cause of action and channels all legal liability to the federal courts for that cause of action.

15. A claim growing out of any nuclear incident is compensable under the terms of the Price-Anderson Act or it is not compensable at all.

16. Congress has completely occupied the field of nuclear safety. Except to the extent specifically permitted by Congress, neither States nor Indian Tribes, including their courts, may assert authority or jurisdiction over any matter touching this area. Congress has ceded no authority or jurisdiction to Indian tribal courts to adjudicate "public liability" actions.

(3) The Tribal Court Suit

17. As set forth in paragraph 3 above, Richards filed suit against VCA and others on March 29, 1995 in Navajo Tribal Court. On August 3, 1995, the Navajo Tribal Court ordered the Foote Mineral Company, Cyprus Foote Mineral Company and Cyrus Amax Mineral Company be joined as defendants in the Tribal Court Suit. At the time the Tribal Court Suit was filed, Cyprus was not transacting any business within the Navajo Nation. No process was ever personally served in the Tribal Court Suit upon Cyprus within the territorial jurisdiction of the Navajo Nation.

18. Cyprus filed a Motion for More Definite Statement on September 19, 1995. By order dated January 3, 1995, the Navajo Tribal Court granted that motion. Thus, Richards filed a First Amended Verified Complaint ("Tribal Court Complaint") on January 29, 1995. Exhibit A. Cyprus moved to dismiss the Tribal Court Suit for lack of subject matter jurisdiction on February 29, 1996. By order dated April 30, 1996, the Navajo Tribal Court denied that motion. Exhibit B.

19. In the Tribal Court Complaint, Richards alleges that Mr. Richards lived near the Monument No. 2 mine and concentrator as a child, between approximately 1950 through 1959. Richards also alleges that Mr. and Mrs. Richards lived near a uranium mill in Mexican Hat, Utah

from approximately 1959 through 1965. Cyprus and its predecessors had no interest whatsoever in the Mexican Hat uranium mill.

20. Richards generally alleges that "[a]s a result of Defendants' conduct of milling and mining uranium ore . . . vast quantities of both radioactive and non-radioactive hazardous substances released into the environment . . . and have caused and will cause Harold Richards, Sr. (deceased) and Plaintiff Zonnie Richards to suffer injuries and damages, including adverse health effects, terminal primary renal cell carcinoma, emotional distress, and annoyance and discomfort . . . ."

21. The Tribal Court Complaint contains seven counts, including claims for wrongful death and loss of consortium, based on theories of negligence, strict liability and fraud. Each count seeks damages "in excess of ONE HUNDRED THOUSAND ($100,000) DOLLARS and further amounts that would fairly and accurately compensate [Mrs. Richards] for her damages."

22. The Tribal Court Suit seeks to impose "public liability" on Cyprus in an action arising out of a "nuclear incident".

23. The assertion of Tribal Court jurisdiction over Cyprus in the Tribal Court Suit concerning the transaction and occurrences set forth in the Complaint therein constitute patent violations of express jurisdictional prohibitions established by the Price-Anderson Act, as amended, and the exclusivity of federal law concerning nuclear safety.

(4) El Paso Natural Gas Co. v. Neztsosie

24. Cyprus requests that the court take judicial notice of the proceedings in *El Paso Natural Gas Co. v. Laura Neztsosie and Arlinda Neztsosie*, CIV 96-0049-PCT-RGS. In that action, the Neztsosies filed suit against El Paso Natural Gas Co. ("EPNG") in Navajo Tribal Court, alleging that they had suffered injuries resulting from EPNG's operations of an open pit uranium mine near Tuba City, Arizona. EPNG filed an action in this district seeking declaratory and injunctive relief on the ground that the Neztsosie's Tribal Court Suit was barred by express jurisdiction prohibitions in the Price-Anderson Act, as amended.

25. A hearing was held on May 28, 1996 on EPNG's application for preliminary injunction before the Honorable Roger G. Strand. Although no formal ruling has been issued to date, Judge Strand indicated from the bench that he would enjoin the Neztsosies from pursuing claims for relief in Navajo Tribal Court that constituted claims under the Price Anderson Act.

COUNT ONE: DECLARATORY JUDGMENT

26. Plaintiffs incorporated by reference all the allegations of Paragraphs 1 through 23 of this Complaint.

27. Plaintiffs are "interested parties" within the meaning of 28 U.S.C. § 2201. They seek a declaration of their rights and legal relations concerning whether they are obligated to appear in and defend themselves in the Tribal Court Suit.

28. Specifically, pursuant to 28 U.S.C. § 2201, *et seq.*, plaintiffs requests declaratory judgment against defendants that:

a. That the Navajo Tribal Court is without subject matter jurisdiction to hear and adjudicate any claims against plaintiffs of the sort alleged in the Tribal Court Suit.

b. That any "judgment," "order" or "decree" or the like which the defendants may procure from the Navajo Tribal Court with respect to any such pending or threatened suit against plaintiffs by defendants in null, void and of no force and effect.

c. That the efforts and threatened efforts of the defendants to pursue claims of the sort currently alleged in the Tribal Court Suit are and wold be violative of plaintiffs' rights, privileges and immunities guaranteed plaintiffs under the Constitution, Treaties, and laws of the United States and of the State of Arizona.

COUNT TWO: INJUNCTION

29. Plaintiffs incorporate by reference the allegations of Paragraphs 1 through 26 of this Complaint.

30. Unless preliminary and permanently enjoined, Richards will proceed with their present and threatened actions seeking to require Cyprus to defend actions in the Navajo Tribal Court, which actions purport to impose "public liability" for a "nuclear incident" upon Cyprus, all without jurisdiction over the subject matter of such suits.

31. Other than by this suit, Cyprus lacks an adequate remedy at law and Richards' actions and threatened actions will cause Cyprus irreparable harm and injury.

WHEREFORE, plaintiffs, independently and in furtherance of their requested declaratory judgment, pray that this Court issue a temporary restraining order, preliminary

injunction and permanent injunction enjoining defendants and their agents from prosecuting or pursuing the Tribal Court Suit or commencing any similar claims or proceedings against plaintiffs or their property in the Navajo Tribal Court or otherwise than in this Court or in some Court of the State of Arizona having jurisdiction over the subject matter.

Plaintiffs further request an aware of their costs incurred in this matter, together with such other and further relief, equitable and legal, to which they may be entitled.

DATED this 25th day of June, 1996.

LEWIS AND ROCA LLP

By _____
Tom Galbraith
R. Neil Taylor III
Attorneys for Plaintiffs

EXHIBIT A

IN THE DISTRICT COURT OF THE NAVAJO NATION
KAYENTA DISTRICT COURT

ZONNIE MARIE DANDY RICHARDS
the estate of Harold J. Richards, Sr.
(deceased)

Plaintiff,

vs.

TEXAS ZINC, VANADIUM CORPORATION OF AMERICA, ATLAS CORPORATION, and all affiliates joint venturers and assignees thereof,

Defendants.

KY-CV-002-95

FIRST AMENDED VERIFIED COMPLAINT

COMES NOW ZONNIE MARIE DANDY RICHARDS, and files the following VERIFIED COMPLAINT:

JURISDICTION AND VENUE

1. Jurisdiction of this matter lies in the Navajo Nation Court, Kaventa District, according to 7 N.T.C. 253 (5), 7 Navajo Tribal Code Section 133 (a,b,c,d,e). 7 Navajo Tribal Code Section 254, 7 Navajo Tribal Code Section 302, 7 Navajo Tribal Code Section 602-610, 7 Navajo Tribal Code Section 651, Title 7 Navajo Tribal Code Section 602 (a) (1),

all of which provide for original jurisdiction in the Tribal Courts of the Navajo Nation.

2. The Plaintiff is a Navajo Indian and, all of the Defendants' acts and omissions took place solely on the Navajo National Reservation. Venue is proper in Kayenta based on the place or places where all transactions and occurrences took place and the sites of the original injury (Mexican Hat and Cane Valley) and is based on the current location and convenience of the Plaintiff.

3. Texas Zinc Corporation, Atlas Corporation, Vanadium Corporation of America, and their successors and assignees partners, joint ventures and/or subdivision thereof one another operated uranium mining and uranium milling facilities in Mexican Hat, Utah and Cane Valley, Arizona.

4. From approximately 1950-1963 at various periods of time Harold J. Richards, Sr. (deceased), husband of Plaintiff Zonnie Richards resided at Defendants' uranium milling facilities in Mexican Hat, Utah and as a child at the Cane Valley, VCA #2 Uranium mill and mine site, Arizona.

5. From 1950 to 1963, Plaintiff Harold J. Richards, Sr. (deceased), C#116.384 was exposed to vanadium and uranium and various radioactive substances and heavy metals through his residence at Defendants' Mexican Hat, Utah uranium mill and as a child, at the Cane Valley, VCA #2 uranium mill and mine sites, Arizona.

6. Defendants operated the Mexican Hat and Cane Valley uranium mine and mill, either as sole entities and/or as partners, joint ventures and/or subdivisions or assignees thereof of one another, from approximately 1950 to 1963. Defendants produced vanadium and uranium concentrate from raw ore which was mined from uranium mines through out the

Navajo Nation Reservation and from VCA #2 (Cane Valley mines) mine in Cane Valley where Harold Richards, Sr. (deceased) resided as a child.

7. From 1959 to 1965, Mr. Richards (deceased), resided in a small trailer located less than 50 yards away from the Mexican Hat mill tailings pile.

8. Mr. Richards (deceased) resided with his parents at the Vanadium Corporation of America (VCA #2 herein after) Uranium Mill site in Cane Valley from approximately 1953 to 1959 when he was still a child.

9. From approximately 1953 to 1959, Mr. Richards (deceased) resided with his parents at the VCA #2 site mill less than 50 yards away from the VCA #2 mill in a residential location which was provided by Defendants for VCA #2 mill and mine workers so that they could walk to work at the VCA #2 mill and mine.

10. During the time that Mr. Richards (deceased), as a child, resided less than 50 yards away from the VCA #2 mill site, no showers, bathing facilities or running water for daily bathing or washing of clothes was available.

11. As a result of Defendants' conduct of milling and mining uranium ore at Cane Valley and milling uranium ore at Mexican Hat, Utah vast quantities of both radioactive and non-radioactive hazardous substances released into the environment at both the Cane Valley, VCA #2 mill site and Mexican Hat mill site, and have caused and will cause Harold Richards, Sr. (deceased) and Plaintiff Zonnie Richards to suffer injuries and damages, including adverse health effects, terminal primary renal cell carcinoma, emotional distress, and annoyance and discomfort, physical and mental impairment and disability, and fear of personal injury and death as well as

loss of care, comfort and consortium and as a result, the Plaintiff Zonnie Marie Dandy Richards has incurred medical expenses and decreased earning capacity, pain and suffering, loss of enjoyment of life, and other past, present and future economic and non-economic damages.

FIRST CLAIM FOR RELIEF
WRONGFUL DEATH OF
HAROLD J. RICHARDS, SR., NEGLIGENCE

12. Plaintiff repeats the allegations contained in Paragraph 1 through 11 and incorporates them by reference herein.

13. Harold J. Richards, Sr. (deceased) was married to Plaintiff Zonnie Marie Dandy Richards when they resided together at the Mexican Hat mill site.

14. Harold J. Richards, Sr., (deceased), was born December 4, 1936. From approximately 1955 to 1963, he resided at either the Cane Valley, Arizona uranium mine and uranium mill, as a child, Mexican Hat uranium mill with his wife, Plaintiff, Zonnie Marie Dandy Richards. Harold Richards, Sr. (deceased) was exposed to vanadium, uranium and various radioactive substances and heavy metals through his residence at the Defendants' Cane Valley uranium mine and mill, as a child, and Mexican Hat uranium mill areas when he resided there with his wife, Plaintiff herein.

15. At the time of Harold Richard, Sr. (deceased) and Plaintiff Zonnie Marie Dandy Richards residence in Mexican Hat, Utah, they lived (50) yards away from Defendants Mexican Hat uranium mill in a small trailer together. Plaintiff Zonnie Marie Dandy Richards and Harold Richards, Sr. (deceased) were allowed to live in such close proximity to the Mexican Hat uranium mill by Defendants, herein, with

Defendants' full knowledge of this residence and its proximity to the Mexican Hat uranium mill. At all times pertinent hereto concerning the Mexican Hat uranium mill, Plaintiff Zonnie Marie Dandy Richards and Harold Richards, Sr. (deceased) were married and resided together as husband and wife.

16. As a result of Defendants' conduct, i.e., the milling of uranium and vanadium ores at Mexican Hat, Utah during Plaintiff's husband Harold Richard, Sr. (deceased) residence at the Mexican Hat mill, Plaintiff's husband Harold Richards, Sr. (deceased) clothes, furniture, housewares, home and food were contaminated with uranium ore dust, yellow cake and toxic chemical residue which came from Defendant's uranium mill at Mexican Hat, Utah. These items were then handled, laundered together, eaten, worn, sat upon and lived in or otherwise came in contact with Mr. Richards (deceased) and Plaintiff. Due to Defendants uranium milling activities in Mexican Hat, Utah, excessive and deleterious quantities of both radioactive and non-radioactive hazardous substances were released into close proximity of Plaintiff Zonnie Marie Dandy Richards and harold Richards, Sr. Mexican Hat residence. Additionally due to Defendants uranium mining and milling activities at Cane Valley at Harold Richard's Cane Valley resided as a child.

Excessive and deleterious qualities of both radioactive and non-radioactive hazardous substances were released into close proximity of Harold Richard Sr. (deceased) residence. These substances have caused and/or will cause Plaintiff and her husband to suffer sickness and death due to cancer and emotional distress, annoyance and discomfort, physical and mental impairment and disability, and fear of personal injury and death. As a result of defendants release of these substances in both Mexican Hat and Cane Valley, Plaintiff Zonnie Marie Dandy Richards and her deceased husband

Harold Richards, Sr., have incurred and will incur in medical expenses including decreased earning capacity, pain and suffering, and death, loss of enjoyment of life, and other past, present and future economic and non-economic damages.

17. During the years the Defendants operated and were responsible for the Mexican Hat mill and Cane Valley uranium mine and mill, Defendants accumulated, handled, processed, treated, stored, burned, and otherwise disposed of large quantities of radioactive and/or hazardous materials at their property in Cane Valley, Arizona and Mexican Hat, Utah.

18. Defendants knew or should have known that these radioactive and/or hazardous materials and constituents posed a hazard to the health and emotional well-being of Plaintiff and her husband, Harold Richards, Sr. (deceased).

19. Defendants owed a duty to Plaintiff and to Harold Richard, Sr. (Deceased) to use reasonable care in the handling and disposal of the hazardous radioactive and toxic materials used or produced at the Mexican Hat uranium mill and Cane Valley uranium mine and mill.

20. Defendants negligently caused or permitted radioactive and toxic emissions to be released from the Mexican Hat uranium mill and Cane Valley uranium mill and mine. These emissions were regularly carried by ground water and soil and contaminated the properties and air where Plaintiff and Harold Richards, Sr. (deceased) resided.

21. Defendants also negligently failed to warn Plaintiff and Harold Richards Sr. (deceased) of the potential for leakage and actual leakage of the hazardous radioactive and toxic materials into the ground water soil and in air of Plaintiff and Harold Richards, Sr. (deceased) home or homes

and the vicinities of the uranium mill as well as Plaintiff and her husband's food, clothing and home environments.

22. As a direct and proximate result of Defendants' breach of duty, the Plaintiff and Harold Richards, Sr. (deceased) sustained injuries and losses, including but not limited to emotional distress and fear, physical injury, loss of enjoyment life, and other economic and non-economic losses as yet unknown.

23. Defendants breached their duty to Plaintiff and Harold Richards, Sr. (deceased) by failing to properly control and contain the radioactive and/or hazardous materials within the confines of the facility and property which they owned, by negligently releasing the radioactive and/or hazardous materials into the air and allowing radioactive materials to migrate or leach into the ground water, surface water, rivers and soil in the vicinity of the Mexican Hat mill site and Cane Valley mine and mill site where Harold Richards, Sr. (decreased) resided.

24. These releases and contaminations of the air, ground water, surface water, rivers and soil in the vicinity of the facilities of the Mexican Hat mill site and Cane Valley mill and mines sites as well as Plaintiff's husband's food, clothing and home environment were proximately caused by Defendants and the results were aggravated by the negligent acts and/or emissions of the defendants including, but not limited to, the following:

(A) permitting the emissions, releases and leaks of radioactive and/or hazardous materials from the facility and property to occur;

(B) failing to determine where and how the emissions, releases and leaks of radioactive and/or hazardous

materials occurred and in failing to correct the problems to prevent further leakage and emissions;

(C) failing to provide adequate containment of the radioactive and/or hazardous materials;

(D) failing to provide adequate air, surface water, ground water, rivers and soil sampling and/or monitoring to detect releases of radioactive and/or hazardous materials;

(E) failing to take proper measurements of particle sizes and emissions;

(F) failing to test incoming ores adequately for the presence of hazardous or toxic materials;

(G) failing to timely and adequately warn or otherwise notify Plaintiff and her husband, Harold Richards, Sr. (deceased) of such contamination and to prevent reoccurring releases;

(H) failing to take timely and adequate remedial actions to contain and clean up such contamination and to prevent reoccurring releases;

(I) failing to property train and supervise their employee to insure that the necessary safeguards and procedures would be followed in the event that any emissions, releases or leaks of radioactive and/or hazardous materials from the facility and property might occur;

(J) failing to comply with applicable Tribal laws;

(K) being negligent in the construction and implementation of remedial measures for containing releases from the tailing ponds and operating facilities;

(L) failing to prevent Harold Richards. Sr. (deceased) from coming in contact with touching or otherwise being exposed to uranium dust, yellow cake and/or toxic chemical residue on Plaintiff's husband Harold Richards, Sr. (deceased) food, clothing, body, and home environment.

25. As a direct and proximate result of Defendants' conduct, Harold Richard, Sr. (deceased) sustained injury and damage in that he contracted renal cell carcinoma.

26. As a direct and proximate result of Harold J. Richards, Sr.'s (deceased) exposure to the radioactive and non radioactive hazardous substances which were released by Defendants at the Mexican Hat mill and the Cane Valley uranium mine (VCA #2). Harold J. Richards, Sr. (deceased) developed and died as a result of renal cell carcinoma.

27. As a consequences of aforesaid injury, Harold Richards, Sr. died on January 5, 1993.

28. Left surviving was his wife, Zonnie Marie Dandy Richards.

29. As a result of the death of Harold Richards, Sr., Plaintiff Zonnie Marie Dandy Richards suffered the loss of society of her husband and other related economic and non-economic damages. expenses.

30. WHEREFORE, the Plaintiff Zonnie Marie Dandy Richards, pray's for Judgment against the Defendant's, in a sum in excess of ONE HUNDRED THOUSAND ($100,000.00) DOLLARS and such further amounts that would fairly and accurately compensate her for her aforesaid damages.

SECOND CLAIM FOR RELIEF
WRONGFUL DEATH OF HAROLD J. RICHARDS: ULTRA HAZARDOUS

31. Plaintiff repeats the allegations contained in Paragraph 1 through 30 and incorporates them by reference herein.

32. Defendants operated the Mexican Hat uranium mill and Cane Valley uranium mill and mine in a manner that created emissions containing high concentrations of radioactive materials and toxic metals including but not limited to the following: uranium, copper, manganese, magnesium, molybdenum, sodium, chloride, sulfate, fluoride, silica, barium, beryllium, cadmium, chromium, cobalt, iron, lead, nickel, silver, strontium, vanadium zinc, aluminum, lithium, radium 226, uranium 238, uranium 234, uranium 235, radon 228, radon 222, selenium, plutonium, lanthanum including curium, luropium, lanthium, gallium, thorium, asernic, mercury, and nitrates as well as alpha, beta and gamma radiation, and other radioactive and toxic chemicals and particularities which is, as such, as a non-natural use of land and as such, constitutes an abnormally dangerous activity which created risks to Plaintiffs and others.

33. The collection, handling and processing of radioactive and non-radioactive hazardous substances as indicated in Paragraph 32 supra is an abnormally dangerous activity or ultra hazardous activity, i.e., one which necessarily involves a risk of serious harm to the person, land or chattels of others which cannot be eliminated by the exercise of the utmost care and is not a matter of common usage.

34. Defendants are strictly liable to Plaintiff and Harold Richard, Sr. (deceased) for all damages and injuries which have resulted and will result from the collection and

processing of radioactive and non-radioactive hazardous substances as indicated in Paragraph 32 supra at the Mexican Hat uranium mill and Cane Valley uranium mine and mill facilities and properties.

35. Harold Richard Sr. (deceased) was born on December 4, 1936 and resided with his wife, Plaintiff Zonnie Marie Dandy Richards at Defendants Mexican Hat uranium mill site. Harold Richard Sr. (deceased) also resided as a child at the Defendant's Cane Valley Uranium mill and mine site.

36. Defendants' collection, handling and processing of radioactive and non-radioactive materials at the Mexican Hat uranium mill and Cane Valley uranium mill and mine facilities and properties have directly and proximately caused releases of such substances into the environment and community surrounding the Mexican Hat uranium mill and Cane Valley uranium mill and mine facilities and properties where Harold J. Richards, Sr. (deceased), either as a child (Cane Valley, VCA #2 as a child and Mexican Hat as an adult) or as husband to Plaintiff, resided.

37. As a direct and proximate result of Defendant's operation of the Mexican Hat uranium mill and the Cane Valley uranium mine and mill facilities in the aforesaid manner, Plaintiff suffered the aforementioned injuries and damages as alleged herein to herself for which Defendants are strictly liable.

38. As a direct and proximate result of Defendants' conduct, Harold Richards, Sr. (deceased) sustained injury and damage in that he contracted renal cell carcinoma.

39. As a consequence of the aforesaid injury, Harold Richards, Sr. died on January 5, 1993. Left surviving is his

wife, Zonnie Marie Dandy Richards, who has suffered a loss of society comfort and consortium and other related damages.

40. WHEREFORE, the Plaintiffs Zonnie Marie Dandy, prays for Judgment against the Defendant, in a sum in excess of ONE HUNDRED THOUSAND ($100,000.00) DOLLARS and such further amounts that would fairly and accurately compensate her for her aforesaid damages.

THIRD CLAIM FOR RELIEF
LOSS OF CONSORTIUM: NEGLIGENCE
HAROLD J. RICHARDS

41. Plaintiff repeats the allegations contained in Paragraphs 1 through 40 above, and incorporates them by reference herein.

42. Harold Richards, Sr. (deceased) was born on December 4, 1936. From approximately 1950 to 1963, Plaintiff Harold J. Richards, Sr. (deceased) was exposed to radioactive and non-radioactive toxic substances at the Mexican Hat uranium mill and Cane Valley uranium mine and mill facilities, where he resided, either as an adult or as a child.

43. Plaintiff Zonnie Marie Dandy Richards and her husband Harold J. Richards, Sr., (deceased) were exposed to vanadium, uranium and various radioactive substances and heavy metals through their residence at the Defendants Mexican Hat Uranium mill. Harold J. Richards, Sr. (deceased) was also exposed to vanadium, uranium radioactive and non-radioactive substances and heavy metals at the Defendant's Cane Valley uranium mine and mill facilities where he resided with his parents as a child.

44. From 1959 to 1965 Plaintiff Zonnie Marie Dandy Richards and her husband resided less than (50) feet from Defendants Mexican Hat uranium mill. Plaintiff Zonnie Marie Dandy Richards and Harold J. Richards, Sr. (deceased) were allowed to live in such close proximity to the Mexican Hat uranium mill by Defendants and with Defendants full knowledge of their residence in such close proximity to these facilities. At all times pertinent hereto concerning the Mexican Hat uranium mill, Plaintiff Zonnie Marie Dandy Richards and Harold J. Richards, Sr. (deceased) were married and resided together as husband and wife.

45. As a result of Defendants' conduct, i.e., the milling of uranium ore, and Mr. Harold J. Richard Sr. (deceased) residence at the Mexican Hat uranium mill and Cane Valley uranium mine and mill, as a child, Harold Richards, Sr. (deceased) came in contact with deleterious quantities of both radioactive and non-radioactive hazardous substances which were released by Defendants' operations at the Mexican Hat and Cane Valley uranium facilities.

46. During the years the Defendants operated and were responsible for the Mexican Hat mill and Cane Valley mine and mill Defendants accumulated, handled, processed, treated, stored, burned, and otherwise disposed of large quantities of radioactive and/or hazardous materials at their properties in Mexican Hat, Utah and Cane Valley, Arizona.

47. Defendants knew or should have known that these radioactive and/or hazardous materials and constituents posed a hazard to the health and emotional well-being of Plaintiff Harold Richards, Sr. (deceased).

48. Defendants owed a duty to Harold Richards, Sr. (deceased) and thereby to Plaintiff to use reasonable care in the handling and disposal of the hazardous radioactive and

toxic materials used or produced at the Mexican Hat uranium mill and Cane Valley mines.

49. Defendants negligently caused or permitted radioactive and toxic emissions to be released from the Mexican Hat uranium mill and Cane Valley uranium mine and mill. These emissions were regularly carried by ground water, soil and air and, therein contaminated the property or properties where Plaintiff and/or Harold Richards Sr. (deceased) resided.

50. Defendants also negligently failed to warn Plaintiff and Harold Richards, Sr. (deceased) of the potential for leakage and actual leakage of the hazardous radioactive and toxic materials into the ground water and soil of Plaintiff and/or Harold Richards, Sr. (deceased), residence of residences.

51. As a direct and proximate result of Defendants' breach of duty, Harold Richards, Sr. and Plaintiff sustained injuries and losses, including but not limited to emotional distress and fear, physical injury, loss of enjoyment of life, and other economic and non-economic losses as yet unknown.

52. Defendants breached their duty to Harold Richards, Sr. (deceased) and to Plaintiff by failing to properly control and contain the radioactive and/or hazardous materials within the confines of the facilities and properties which they owned, by negligently releasing the radioactive and/or hazardous materials into the air and allowing radioactive materials to migrate or leach into the ground water, surface water, rivers and soil in the vicinity of the Mexican Hat mill and Cane Valley mine and mill sites.

53. These releases and contaminations of the air, ground water, surface water, rivers and soil in the vicinity of the

facilities of the Mexican Hat uranium mill and Cane Valley uranium mine and mill sites were proximately caused by Defendants and the results were aggravated by the negligent acts and/or emissions of the Defendants including, but not limited to, the following:

(A) permitting the emissions, releases and leaks of radioactive and/or hazardous materials from the facility and property to occur;

(B) failing to determine where and how the emissions, releases and leaks of radioactive and/or hazardous materials occurred and in failing to correct the problems to prevent further leakage and emissions;

(C) failing to provide adequate containment of the radioactive and/or hazardous materials;

(D) failing to provide adequate air, surface water, ground water, rivers and soil sampling and/or monitoring to detect releases of radioactive and/or hazardous materials;

(E) failing to take proper measurements of particle sizes and emissions;

(F) failing to test incoming ores adequately for the presence of hazardous or toxic materials;

(G) failing to timely and adequately warn or otherwise notify Plaintiffs of such contamination and to prevent reoccurring releases;

(H) failing to take timely and adequate remedial actions to contain and clean up such contamination and to prevent reoccurring releases;

(I) failing to properly train and supervise their employees to insure that the necessary safeguards and procedures would be followed in the even that any emissions, releases or leaks of radioactive and/or hazardous materials from the facilities and properties might occur;

(J) failing to comply with applicable Tribal laws;

(K) being negligent in the construction and implementation of remedial measures for containing releases from the tailing ponds and operating facilities.

(L) failing to prevent Harold J. Richards, Sr. from coming in contact with, touching, or otherwise being exposed to uranium dust, yellow cake and/or toxic chemical residue on Plaintiff Zonnie Marie Dandy Richards's husband's food, clothing and body and home environment.

54. As a direct and proximate result of Plaintiff's conduct, Harold J. Richards, Sr. sustained injury and damage in that he contracted renal cell carcinoma.

55. As a consequence of the aforesaid injury, Harold J. Richards, Sr. died on January 5, 1993.

56. Left surviving was his wife Zonnie Marie Dandy Richards.

57. As a result of the death of Harold J. Richards, Sr., Plaintiff Zonnie Marie Dandy Richards has suffered and will continue to suffer a loss of consortium.

58. WHEREFORE, Plaintiff Zonnie Marie Dandy Richards, prays for Judgment against the Defendants, in a sum in excess of ONE HUNDRED THOUSAND ($100,000.00)

DOLLARS and such further amounts that would fairly and accurately compensate her for her aforesaid damages.

FOURTH CLAIM FOR RELIEF
LOSS OF CONSORTIUM:
ULTRA HAZARDOUS ACTIVITY

59. Plaintiffs repeat the allegations contained in Paragraph 1 through 58 and incorporate them by reference herein.

60. Plaintiff Harold J. Richards, Sr. (deceased) was the lawful spouse of Plaintiff Zonnie Marie Dandy Richards at times relevant to the Defendant's Mexican Hat mill operations.

61. Defendants operated the Mexican Hat uranium mill and Cane Valley uranium mill and uranium mine in a manner that created emissions containing high concentrations of radioactive materials and toxic metals including but not limited to the following: uranium, copper, manganese, magnesium, molybdenum, sodium, chloride, sulfate, fluoride, silica, barium, beryllium, cadmium, chromium, cobalt, iron, lead, nickel, silver, strontium, vanadium zinc, aluminum, lithium, radium 226, uranium 238, uranium 234, uranium 235, radon 228, radon 222, selenium, plutonium, lanthanum including curium, luropium, lanthium, gallium, thorium, asernic, mercury, and nitrates as well as alpha, beta and gamma radiation, and other radioactive and toxic chemicals and particulate which is, as such, was a non-natural use of land and as such, constitutes an abnormally dangerous activity which created risks to Plaintiffs and others.

62. The collection, handling and processing of radioactive and non-radioactive hazardous substances as indicated in Paragraph 61-supra is an abnormally dangerous

activity or ultra hazardous activity, i.e., one which necessarily involves a risk of serious harm to the person, land or chattels of others which cannot be eliminated by the exercise of the utmost care and is not a matter of common usage.

63. Defendants are strictly liable to Plaintiff for all damages and injuries which have resulted and will result from the collection and processing of radioactive and non-radioactive hazardous substances as indicated in Paragraph 61-supra at the Mexican Hat uranium mill and Cane Valley uranium mill and mine facility and property.

64. Defendants' collection, handling and processing of radioactive and non-radioactive materials at the Mexican Hat uranium mill and Cane Valley uranium mill and mines have directly and proximately caused releases of such substances into the environment and communities surrounding the Mexican Hat uranium mill and Cane Valley uranium mill and mine facilities and properties.

65. Harold J. Richards, Sr. (deceased) was born on December 4, 1936, and at times relevant to the Mexican Hat uranium mill resided with his wife Plaintiff Zonnie Marie Dandy Richards.

66. As a direct and proximate result of Defendants' operation of the Mexican Hat uranium mill and Cane Valley uranium mine and mill facilities in the aforesaid manner, Harold J. Richards Sr. (deceased) suffered the aforementioned injuries and damages as alleged herein, for which Defendants are strictly liable.

67. As a direct and proximate result of Defendant's conduct, Harold J. Richards, Sr. (deceased) sustained injury and damage in that he contracted renal cell carcinoma.

68. As a consequence of the aforesaid injury, Harold J. Richards, Sr. died on January 5, 1993. Left surviving was his wife, Plaintiff Zonnie Marie Dandy Richards.

69. As a result of the death of Harold J. Richards, Sr. his wife has suffered and will suffer loss of consortium.

70. WHEREFORE, the Plaintiffs Zonnie Marie Dandy Richards prays for Judgment against the Defendant, in a sum in excess of One HUNDRED THOUSAND ($100,000.00) DOLLARS and such further amounts that would fairly and accurately compensate her for her aforesaid damages.

FIFTH CLAIM FOR RELIEF
OUTRAGEOUS CONDUCT

71. Plaintiff repeats the allegations contained in Paragraph 1 through 70 above, and incorporates them by reference herein.

72. The actions and inactions of Defendants complained of herein are so outrageous in character and so extreme in degree as to compel a reasonable person in the Navajo community to declare the same as atrocious, beyond all bounds of decency, and utterly intolerable in a civilized Navajo community.

73. As a direct and proximate result of the above conduct, Plaintiff has suffered severe emotional distress and has been injured and damaged as alleged herein.

74. WHEREFORE, the Plaintiff's Zonnie Marie Dandy Richards prays for Judgment against the Defendant, in sum in excess of ONE THOUSAND ($100,000.00) DOLLARS and such further amounts that would fairly and accurately compensate her for her aforesaid damages.

SIXTH CLAIM FOR RELIEF
MISREPRESENTATION/FRAUD AND DECEIT

75. Plaintiff repeats the allegations contained in Paragraph 1 through 74 above and incorporates them by reference herein.

76. Defendants failed, both negligently and intentionally, to disclose to Harold J. Richards, Sr. and to Plaintiff, material facts which were known to them concerning the nature, magnitude and effects of the release of and exposure to radioactive and other hazardous substances which were generated, handled, stored, treated or disposed of at the Mexican Hat uranium mill and the Cane Valley uranium mill and mine facilities and properties.

77. Defendants knew of and concealed, misrepresented and failed to disclose the true facts with the intention of creating a false impression of the actual facts in the minds of Harold Richards, Sr. and Plaintiff, and with the intent that Harold Richards, Sr. and Plaintiff be lulled into complacency and refrain from seeking redress or pursuing remedial action due to the development and death from renal cell cancer of Harold Richards, Sr. (deceased).

78. Plaintiff and Harold Richards, Sr. (deceased) reasonably believed Defendants' misrepresentations and relied upon the same in refraining until the resent from seeking redress or pursuing remedial action.

79. As a direct result of Defendants' negligent and/or intentionally false and deceptive representations and Plaintiff and Harold Richards, Sr. (deceased), reasonable relief of and reliance thereon, many of the injuries and damages to Plaintiff arising out of the releases of hazardous substances into the

environment were compounded by the passage of time and direct, daily exposure by Harold J. Richards, Sr. to same.

80. As a direct and prominent result of Defendants' conduct, Plaintiff has been injured and damaged as alleged herein.

WHEREFORE, the Plaintiff Zonnie Marie Dandy Richards pray's for Judgment against the defendant, in a sum in excess of ONE HUNDRED THOUSAND ($100,000.00) DOLLARS and such further amounts that would fairly and accurately compensate her for her aforesaid damages.

SEVENTH CLAIM FOR RULING
EXEMPLARY DAMAGES AGAINST ALL DEFENDANTS

81. Plaintiff repeats the allegations contained in Paragraph 1 through above 80 and incorporates them by reference herein.

82. The actions of Defendants complained of herein were attended by circumstances of fraud, malice, and insult, and the wholly wanton and reckless disregard of Harold Richards, Sr.'s and Plaintiff's lives and health by Defendants actions justifies to an additional award of exemplary damages.

WHEREFORE, the Plaintiffs Zonnie Marie Dandy Richards prays for Judgment against the Defendant, in a sum in excess of ONE HUNDRED THOUSAND ($100,000.00) DOLLARS and further amounts that would fairly and accurately compensate her for her aforesaid damages.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays that judgment be entered in their favor and against Defendants for compensatory damages, consequential damages, special damages and exemplary damages, reasonable costs and expenses associated with this litigation, including attorney's fees and such other and further relief as this Court deems just and proper.

/signed/ 1-29-96
Cherie V. Daut
Attorney at Law for
Zonnie Marie Dandy Richards
P.O. Box 1357
Shiprock, New Mexico 87420
(505) 368-5878

EXHIBIT B

IN THE DISTRICT OF THE NAVAJO NATION
JUDICIAL DISTRICT OF KAYENTA, ARIZONA

Zonnie Marie Dandy Richards
(The Estate of Harold J. Richards, Sr.
Deceased),

Plaintiff,

vs.

TEXAS ZINC, VANADIUM CORPORATION OF AMERICA, ATLAS CORPORATION, and all affiliates joint venturers and assignees thereof,

Defendants.

KY-CV-002-95

ORDER DENYING MOTION TO DISMISS

This matter came before the Court on the Defendant's Motion to Dismiss for Lack of Subject Matter Jurisdiction and Failure to State a Claim upon which this Court may grant relief. For the reasons below, the Motion to Dismiss is denied and the Court will proceed on the merits.

FACTS

Plaintiff Zonnie Marie Dandy Richards, on behalf of the Estate of Harold J. Richards, Sr., alleges that the decedent lived as a child near the defendants' mining and milling facility. Mr. and Mrs. Richards lived near another uranium milling facility in Mexican Hat, Utah. The plaintiffs claim that the defendants operated the Mexican Hat uranium

mill and VCA #2 uranium mine. They are located on Navajo trust land. Through his residence near one or more of these sites, Mr. Richards was exposed to radioactive materials from the processing of uranium that allegedly caused his death. As a result, Zonnie Richards filed a civil suit seeking damages for injuries. It is unclear to the Court whether she has filed suit in her capacity as representative of her deceased husband's estate or, individually, in her own right or both.

MOTION TO DISMISS

Defendants Vanadium Corporation of American and the successors-in-interest to VCA, Cyprus Foote Mineral Corporation and Foote Minerals Corporation assert that the Navajo Court has no jurisdiction under express provisions of federal law, the Price-Anderson Act. 42 USC ss2011 et esq.

This case presents the question of whether the Navajo Court has civil jurisdiction over the defendants. They claim that 1) Navajo Nation jurisdiction is pre-empted by the Price-Anderson Act and 2) the Court's exercise of jurisdiction would frustrate the removal provisions of the Act, which give the defendants an "absolute" right to remove the case to federal court. That question can be resolved by considering the impact of treaties, statutes and the inherent sovereignty of the Navajo Nation.

SUBJECT MATTER JURISDICTION

The Navajo Nation Code grants the District Courts original jurisdiction over all civil actions in which the defendant "...has caused an action to occur within the territorial jurisdiction of the Navajo Nation." 7 NTC ss253(2). The issue is whether the Navajo Nation has the power to assert civil jurisdiction over non-Indian defendants whose

allegedly tortious conduct occurred within the Navajo Nation, given the Price-Anderson Act.

Indian nations have been characterized as "quasi-sovereigns", Fisher v. District Court, 424 U.S. 382, 390, 96 S.Ct. 943, 948, 47 L.Ed.2d 106 (976) (per curiam:, and it has been noted that the sovereignty of tribes is different from that of states. See Native American Church v. Navajo Tribal Council, 272 F.2d 131 (10th cir. 1959); 1 NTC Chapter 1. White Mountain Apache Tribe v. Bracker, 448 U.S. 136 143, 100 S.Ct. 2578, 2583, 65 L.Ed.2d 665 (1980).

The United States Supreme Court has suggested the following analysis for ascertaining the limits of tribal sovereignty: Indian nations retain those powers of self-government not voluntarily relinquished by treaty, not divested by Congressional enactment, and not inconsistent with the overriding sovereign interests of the United States. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 208-09, 98 S.Ct. 1011, 1020-21, 55 L.Ed.2d 209 (1978). See United States v. Wheeler, 435 U.S. 313, 98 S.Ct. 1079, 55 L.Ed.2d 303 (1978). Tribes may also exercise those powers which would otherwise be inconsistent with overriding federal interests if Congress has explicitly delegated such powers to them. Montana v. United States. _____ U.S.____, 101 S.Ct. 1245, 67 L.Ed. 2d 493 (1981).

This Court does not find anything in the 1850 or 1868 Navajo Treaties to support the proposition that the Navajo Tribe has explicitly relinquished civil jurisdiction over non-Indians. However, the defendants have presented the claim that the Price-Anderson Act precludes the Navajo Nation from hearing the claims raised. The applicable provision is 42 USC ss2210(n)(2) which confers original jurisdiction on the U.S. District Courts, without regard for diversity of citizenship or the amount in controversy, over any

public liability action "arising out of or resulting from a nuclear incident." ss2014(w). Whether or not this is a "nuclear incident" is a factual issue for trial.

With respect to the third prong of the analysis, the defendants argue that the exercise of tribal court jurisdiction over it would be inconsistent with overriding federal interests and thus is not among the retained powers of the tribe. The tribal court's power to adjudicate claims involving injuries from uranium operations located on the Navajo reservation is of the type the United States has a concern in protecting. The federal government has an interest in regulating the production of nuclear power and protecting the health and safety of the public. However, the exercise of civil jurisdiction by the Navajo court is consistent with the federal interests in resolving claims of injuries arising out of a nuclear incident. Assuming jurisdiction over this case is necessary to protect tribal self-government, to control internal relations and does not jeopardize the security and safety concerns which prompted the Price-Anderson Act.

In this case, the alleged actions took place within the territorial jurisdiction of the Navajo Nation. As the injuries occurred on the reservation, a tribal forum to redress such injuries is clearly related to tribal self-government or internal relations since the defendants' allegedly tortious conduct occurred on the reservation. Defendants are located on the reservation and the plaintiffs live on the reservation. Defendants are located on the reservation and the plaintiffs live on the reservation. As such, the defendants' activities giving rise to the dispute are within the territorial sovereignty of the tribe.

Further, the plaintiffs did business within the Navajo Nation and thus there is a consensusal link under United States v. Montana, 450 U.S. 544 (1981). This is

important since the U.S. Supreme Court make that an underpinning for civil jurisdiction over non-Indian in Montana. In that case, the Supreme Court held that a tribe may regulate the activities of nonmembers who enter consensusal relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements. Id. at 565. Here, the defendants chose to operate mills and mines on the reservation. It is assumed that in order to do business on the reservation agreements or dealings with the Navajo Nation were made which subjected defendants to tribal court civil jurisdiction. Arizona Public Services v. Office of Navajo Labor Relations, A-CV-08-87 (decided 1990).

Another aspect of Montana is that a tribe may retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe. Id. at 566. The facts before the court suggest that non-Indians operating uranium mines and mills threatens the tribe's political or economic security to justify tribal regulation. Commercial activities in the Navajo Nation must abide by Navajo Nation laws. In addition, the inherent dangers entailed in uranium mining and milling may threaten the welfare and safety of the Tribe. Thus, the defendants are within the jurisdiction of the Navajo courts.

CHOICE OF LAW

The defendants ask the court to defer to federal jurisdiction as a matter of comity. That is a reverse Farmer's Union claim. National Farmers Union Insurance Cos. et al. v. Crow Tribe of Indians et al., 471 U.S. 845 (9th Cir. 1985). That court believed that the existence and extent of a tribal court's jurisdiction requires an examination of tribal

sovereignty which should be conducted in the first instance in the Tribal Court evaluating the factual and legal bases for a jurisdictional challenge. Id. at 855-56.

The most recent Navajo Nation Supreme Court decision on comity is Rough Rock Community School v. Navajo Nation, No. SC-CV-06-94 (March 14, 1996). This is an "applicable law" decision and not a "deference to another sovereign" decision.

In Rough Rock the Navajo Supreme Court ruled that under the Navajo Nation doctrine of comity, a foreign statute, court decision or public act must comply with Navajo Nation public policy. The Navajo Nation is aware that economic development is important to the Nation. However, there are consequences for doing business on the Nation. Under the Navajo Nation's sovereign authority to regulate business, establish the rules for doing business within the Navajo Nation, or decide which acts of state of foreign jurisdictions will or will not be honored within the Navajo Nation is a matter of comity.

The Navajo Nation courts have the authority to apply any federal law that may be applicable. 7 NTC ss204(a). This action arose within the territorial jurisdiction of the Navajo Nation involving Navajo plaintiffs. The Navajo Nation courts have the power to apply federal law. Comity is not applicable in this case.

In addition, defendants claim they have a right to consolidate all related actions in the appropriate federal court because "nuclear energy issues are emotionally charged; scientific evidence on causation is complex; and damages claims are potentially gargantuan." Defendants brief at 32. argument that tribal courts are somehow biased or not competent enough to render just decisions. Iowa Mutual

Insurance Co. vs. La Plante, 480 U.S. 9, 19 (1987). Since this case cannot be removed to federal court, requiring the defendants to defend in the Navajo Nation court would not be unduly unfair or inconvenient. Defendants are encouraged to consolidate any related claims in this forum.

It is therefore, ORDERED that defendants Motion to Dismiss for Lack of Subject Matter Jurisdiction is hereby DENIED. The defendants are further encouraged to consolidate any related claims in this forum.

So ORDERED this 30th day of April, 1996.

[signed]
JUDGE, District Court of the Navajo Nation

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

No. CIV 96-0049-PCT-RGS

EL PASO NATURAL GAS COMPANY, a Delaware Corporation,
Plaintiff,

v.

LAURA NEZTSOSIE and ARLINDA NEZTSOSIE,
Defendants.

Order Denying Plaintiff's Request for Preliminary Injunction and Granting Limited Injunction

---

Transcript of Proceedings
May 28, 1996

THE COURT: The plaintiff's application for preliminary injunction is denied to the extent that it in any way seeks to have this Court declare any aspect the jurisdiction of the Navajo tribal court. There is -- there is a set of differing views as to what this lawsuit involves. And when I say "this lawsuit," I mean the lawsuit brought by the defendants here as plaintiffs against El Paso Natural Gas in the tribal court.

The Navajo tribal court may or may not be presented with the issue of whether or not it has jurisdiction over all aspects of this case, that is to say this case should it include claims

under the Price-Anderson Act as well as simply claims of negligence and other bases for a tort claim.

The Court does grant El Paso Natural Gas Company's requested relief to the extent that it enjoins the named defendants here, plaintiffs in the tribal court, from pursuing a Price-Anderson Act complaint in tribal Court. The Court's rationale for granting that limited aspect of the relief is application of the *National Farmer*'s three-factor test to the issues involved plus a consideration of the holdings in the case decided in this District Court in 1981, UNC Resources versus Benally.

In citing that case, I recognize that there are significant variations in the contacts, but taking the relevant analysis, the Court does that in supporting its limited grant of relief to the El Paso Natural Gas Company here by way of the preliminary injunction granted.

Now, I want it clear to the parties as to what is granted here and what is not granted here, and what the parties can and can't do in tribal court. The parties are enjoined from pursuing, as I said earlier, a cause of action in tribal court based upon the Price-Anderson Act for the reasons stated.

If the plaintiffs in that court want to, in effect, test the extent to which the Navajo tribal court believes it has jurisdiction, presumably it might be able to seek declaratory relief in that court from the tribal court as to its opinions as to its -- extent of its jurisdiction. And that is consistent with the Court's disinclination to in any way impede the jurisdiction of the tribal court in exploring its powers.

It is a case of importance in the sense that there's no doubt but what the operation of a facility on the -- on tribal lands that may affect a broad segment of tribal population from a health standpoint or otherwise is a matter of dramatic and significant concern to the tribe and to its government.

It is, of course, also true that the United States has a very strong and compelling interest to assure that it operates its nuclear industry in all of its varying facets in a manner that is

uniformly appropriate for all who are exposed to both its benefits and its burdens. And because of the uniqueness of the geographic location of the sovereign tribal governments within the boundaries of the United States, it compounds this problem and, of course, also in part of that mix of complexity is the power, burden and responsibility of Congress to enact laws concerning the sovereign Indian nations within the United States.

It is the Court's belief that its ruling in this area preserves tribal sovereignty in its fullest measure, but at the same time recognizes the interests that have been argued concerning the nuclear industry, for lack of a better word, within the United States.

It's hoped that this will enable the parties to clarify the issue within the tribal court of its jurisdiction. It may be that it will conclude that on this narrow area it lacks jurisdiction or defers jurisdiction or is otherwise willing to permit claims to be adjudicated not in its own forum, or it may feel that clearly it does have it and if that's true, why then presumably there will be opportunities to test that decision within its own legal structure and there may be other occasions upon which that can be tested as well and in the United States District Court or in other courts.

I hope I've helped to clear and not muddy the waters that have been brought to me by this litigation.

Order

STRAND, Judge:

On May 28, 1996, plaintiff El Paso Natural Gas Company's application for a preliminary injunction of all tribal proceedings in the case of *Neztsosie v. El Paso Natural Gas Company*, Court of the Navajo Nation, District of Tuba

City, Case No. TC-CV-0052-95, came on for hearing. After considering the parties' written motions, their supporting memoranda, and oral argument of counsel both at the hearing on May 28, 1996, and at a telephonic hearing regarding the wording of this order on July 11, 1996, this Court makes the following ruling pursuant to Federal Rule of Civil Procedure 65(d):

Plaintiff El Paso Natural Gas Company's Application for Preliminary Injunction is denied to the extent that it in any way seeks to have this Court rule on any aspect of jurisdiction of the Navajo tribal court. This Court denies El Paso Natural Gas Company's request for an injunction of tribal proceedings in *Neztsosie v. El Paso Natural Gas Company*, except to the extent that Laura and Arlinda Neztsosie seek relief based upon the Price-Anderson Act in tribal court. In all other respects, the relief sought by the plaintiff in its application for preliminary injunction is denied.

In reaching this decision, this Court relies on the principles of tribal sovereignty, the tribal exhaustion doctrine, the factors set forth in *National Farmers Union Ins. Co. v. Crow Tribe of Indians*, 471 U.S. 845 (1985), *UNC Resources, Inc. v. Benally*, 518 F.Supp. 1046 (D. Ariz. 1981), and on arguments and authorities presented by the parties in their papers and oral argument. In reaching this decision, the Court does not determine whether or not the provisions of the Price-Anderson Act have any application to the claims asserted by Laura and Arlinda Neztsosie in tribal court. It is further

ORDERED, approving cash bond in the amount of ONE THOUSAND and 00/100 DOLLARS ($1,000.00) in support of this injunction pursuant to Federal Rule of Civil Procedure 65(c).

SO ORDERED on this 3rd day of November, 1996.

Hon. Roger G. Strand
Judge of the United States District Court

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

No. CIV 96-01524-PCT-RGS

CYPRUS FOOTE MINERALS COMPANY,
a Pennsylvania Corporation, et al.,
Plaintiffs,

v.

ZONNIE MARIE DANDY RICHARDS,
individually and as representative of
the Estate of Harold J. Richards, Sr.,
Defendant.

Order

Plaintiff has filed this action seeking an order enjoining Defendant from pursuing the lawsuit of *Zonnie Marie Dandy Richards (The State of Harold J. Richards, Sr., Deceased) v. Texas Zinc, et al.*, which is pending in the District Court of the Navajo Nation, Kayenta District, No. KY-CV-002-95. Plaintiffs have filed an application for preliminary injunctive relief. After considering the parties' pleadings, the Court makes the following ruling:

Plaintiffs' application for a preliminary injunction is denied to the extent that it seeks to have this Court decide whether the Navajo tribal court has jurisdiction over the case before it. Further, Plaintiffs' request for an injunction of the tribal proceeding in *Zonnie Marie Dandy Richards (The State of Harold J. Richards, Sr., Deceased) v. Texas Zinc, et al.* is

denied except to the extent that Defendant seeks relief under the Price-Anderson Act in tribal court.

The Court bases its decision on the principles of tribal sovereignty, the tribal exhaustion doctrine, the factors set forth in *National Farmers Union Ins. Co. v. Crow Tribe of Indians*, 471 U.S. 845 (1985), *UNC Resources, Inc. v. Benally*, 518 F. Supp. 1046 (D. Ariz. 1981), and the additional authorities cited by the parties in their pleadings.

In reaching this decision, the Court does not determine whether or not the provisions of the Price-Anderson Act have any application to the claims asserted by Defendant in tribal court.

Accordingly,

IT IS ORDERED granting in part and denying in part Plaintiffs' Application for Preliminary Injunction (doc. #2).

FURTHER ORDERED approving a cash bond in the amount of ONE THOUSAND DOLLARS ($1000.00) in support of this injunction pursuant to Federal Rule of Civil Procedure 65(c).

DATED this 21st day of NOVEMBER, 1996.

[signed]

HONORABLE ROGER G. STRAND
U.S. DISTRICT COURT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

EL PASO NATURAL GAS COMPANY,
a Delaware Corporation,
Plaintiff-Appellant,

v.

LAURA NEZTSOSIE; ARLINDA NEZTSOSIE,
Defendants-Appellees.

No. 96-17121
DC No. CV-96-00049-RGS

CYPRUS FOOTE MINERAL COMPANY,
a Pennsylvania Corporation;
CYPRUS AMAX MINERAL COMPANY,
a Delaware Corporation,
Plaintiffs-Appellants,

v.

ZONNIE MARIE DANDY RICHARDS,
individually and as representative
of the Estate of Harold J.Richards, Sr.,
Defendant-Appellee.

No. 96-17139
DC No. CV-96-01524-RGS

Appeals from the United States District Court
for the District of Arizona

Filed February 11, 1998
Amended April 27, 1998

Before: Judges Harry Pregerson, Warren J. Ferguson, and Andrew J. Kleinfeld, Circuit Judges

Opinion by Judge Pregerson; Dissent by Judge Kleinfeld

OPINION

PREGERSON, Circuit Judge:

Members of the Navajo Nation (the "Navajo Court Plaintiffs") filed two separate actions in Navajo Tribal Court against corporations that conducted uranium mining operations on the Navajo Nation Reservation. The Navajo Court Plaintiffs alleged personal injury and wrongful death claims based on Navajo common law. In response to those actions, El Paso Natural Gas Company ("El Paso") and Cyprus Foote Mineral Company and Cyprus Amax Minerals Company (collectively "Cyprus") filed two separate suits in federal district court seeking preliminary injunctions to enjoin the Navajo Tribal Court from asserting jurisdiction over the Navajo Court Plaintiffs' claims. El Paso and Cyprus (collectively the "mining companies") alleged that all actions arising from "nuclear incidents" fall within the Price-Anderson Act, 42 U.S.C. § 2011 *et seq.*, and must be litigated in federal court.

The district court granted in part, and denied in part, the mining companies' requests for preliminary injunctions. The district court granted the preliminary injunctions to the extent the Navajo Court Plaintiffs alleged claims under Price-Anderson. The district court denied the preliminary injunctions, however, to the extent the Navajo Court Plaintiffs did not allege Price-Anderson claims. We have jurisdiction under 28 U.S.C. § 1292(a)(1). We affirm in part and reverse in part.

FACTS AND PRIOR PROCEEDINGS

The two actions filed by the Navajo Court Plaintiffs have been consolidated for this appeal. The facts and prior proceedings in each of these actions are as follows:

1. *Neztsosie v. El Paso*

Between 1956 and 1959, Rare Metals Corporation of America ("Rare Metals"), a now defunct subsidiary of El Paso, conducted uranium mining operations on the Navajo Nation Reservation. On March 29, 1995, Laura and Arlinda Neztsosie (the "Neztsosies"), members of the Navajo Nation, filed suit against Rare Metals in Navajo Tribal Court. The Neztsosies asserted claims for personal injuries arising from Rare Metals' uranium mining activities.

On January 5, 1996, El Paso filed suit against the Neztsosies in the United States District Court for the District of Arizona. El Paso sought a preliminary injunction enjoining the Neztsosies from prosecuting their claims in the Navajo Tribal Court. El Paso also sought a declaration that the Navajo Tribal Court had no jurisdiction over the Neztsosies's claims. El Paso asserted that the Neztsosies had to litigate their claims in federal court because their claims alleged liability arising from a "nuclear incident" under the Price-Anderson Act, 42 U.S.C. §§ 2014, 2210.

After a hearing, District Court Judge Robert G. Strand, entered an order denying in part, and granting in part, El Paso's request for a preliminary injunction. The district court denied El Paso's request for a preliminary injunction "to the extent that it in any way seeks to have this Court rule on any aspect of jurisdiction of the Navajo tribal court . . . except to the extent that [the Neztsosies] seek relief based upon the Price-Anderson Act in tribal court." In reaching its decision, the district court relied on "principles of tribal sovereignty" and the "tribal exhaustion doctrine." The district court stated,

however, that it did not determine whether Price-Anderson had any application to the claims asserted by the Neztsosies in Tribal Court.

2. *Richards v. Cyprus*

Cyprus Foote Mineral Company is the successor by merger to Vanadium Corporation of America ("VCA"). From the 1940's through the 1960's, VCA operated a uranium mine in Cane Valley, Arizona, known as Monument No. 2 mine. During the 1960's, VCA also constructed and operated a uranium concentrator at the Monument No. 2 mine site. The remnants of the ore concentrating process consisted of uranium tailings. The tailings produced by the concentrator were stored on a tailings pile on land adjacent to the Monument No. 2 mine site.

On April 20, 1995, Zonnie Marie Dandy Richards, a member of the Navajo Nation, filed suit individually, and as representative of her deceased husband's estate, against VCA and others in Navajo Tribal Court. Richards asserted claims for wrongful death and personal injuries arising from VCA's activities at the Monument No. 2 mine site.

On June 26, 1996, Cyprus filed suit against Richards in the United States District Court for the District of Arizona. Like El Paso, Cyprus sought a preliminary injunction enjoining Richards from prosecuting her claims in Navajo Tribal Court. Cyprus also sought a declaration that the Navajo Tribal Court had no jurisdiction over Richards's claims. Cyprus alleged that Richards had to litigate her claims in federal court because she alleged liability arising from a "nuclear incident" under Price-Anderson.

The Richards action, like the Neztsosie action, was assigned to District Court Judge Strand. The district court entered an order substantially similar to the order issued in the Neztsosie matter. The district court denied in part, and granted in part, Cyprus's request for a preliminary injunction.

El Paso and Cyprus timely appeal the district court's orders.

STANDARD OF REVIEW

We review de novo whether the district court was required to abstain from granting or denying an injunction when a party has failed to exhaust tribal court remedies. *Burlington N. R.R. v. Red Wolf*, 106 F.3d 868, 869-70 (9th Cir. 1997) (en banc).

I. The Tribal Exhaustion Requirement

The Supreme Court has stated that, subject to certain exceptions, comity principles require federal courts to either dismiss or abstain from deciding cases in which a party asserts that concurrent jurisdiction exists in an Indian tribal court. *Crawford v. Genuine Parts Co.*, 947 F.2d 1405, 1407 (9th Cir. 1991) (citing *National Farmers Un. Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845 (1985) and *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9 (1987)). "Considerations of comity require the exhaustion of tribal remedies before the [tribal court's jurisdiction] may be addressed by the district court." *Wellman v. Chevron USA, Inc.*, 815 F.2d 577, 578 (9th Cir. 1987). "The requirement of exhaustion of tribal remedies is not discretionary; it is mandatory." *Burlington N. R.R. v. Crow Tribal Council* ("*Crow Tribal Council*"), 940 F.2d 1239, 1245 (9th Cir. 1991). "Until petitioners have exhausted the remedies available to them in the Tribal Court system, it would be premature for a federal court to consider any relief." *National Farmers*, 471 U.S. at 857 (footnote omitted); *see also Yellowstone County v. Pease*, 96 F.3d 1169, 1171 (9th Cir. 1996), *cert. denied*, 117 S. Ct. 1691 (1997) ("[A] party *must* exhaust tribal court remedies before a federal district court may entertain a challenge to tribal jurisdiction.") (emphasis added); *Crow Tribal Council*, 940 F.2d at 1244

("[F]ederal courts should not even make a ruling on tribal court jurisdiction until tribal remedies are exhausted.") (citation omitted).

"[T]he initial determination of whether the Tribe has jurisdiction lies with the tribal court alone." *Crow Tribal Council*, 940 F.2d at 1244. "[N]on-Indian defendants *must exhaust tribal court* remedies before seeking relief in federal court, even where defendants allege that proceedings in tribal court exceed tribal sovereign jurisdiction." *Id.*

The tribal exhaustion requirement is based on considerations of comity and the long-standing policy of promoting tribal self-government and self-determination. *National Farmers*, 471 U.S. at 856. "[T]he federal policy supporting tribal self-government directs a federal court to stay its hand in order to give the tribal court a 'full opportunity to determine its own jurisdiction.'" *Iowa Mut.*, 480 U.S. at 16 (quoting *National Farmers*, 471 U.S. at 857).

The existence and extent of a tribal court's jurisdiction require a careful examination of tribal sovereignty. "[T]hat examination should be conducted in the first instance in the Tribal Court itself." *National Farmers*, 471 U.S. at 856. "[P]roper respect for tribal legal institutions requires that they be given a 'full opportunity' to consider the issues before them and 'to rectify errors.'" *Iowa Mut.*, 480 U.S. at 16 (citing *National Farmers*, 471 U.S. at 857).

While tribal exhaustion promotes tribal self-government and self-determination, it also promotes judicial efficiency:

> [T]he orderly administration of justice in the federal court will be served by allowing a full record to be developed in the Tribal Court before either the merits or any question concerning appropriate relief is addressed . . . . Exhaustion of tribal court remedies, moreover, will encourage tribal courts to explain to the parties the precise basis for accepting jurisdiction, and will also provide other courts with the benefit of

their expertise in such matters in the event of further judicial review.

National Farmers, 471 U.S. at 856-57. "Congress is committed to a policy of supporting tribal self-government and self-determination. That policy favors a rule that will provide the forum whose jurisdiction is being challenged the first opportunity to evaluate the factual and legal bases for the challenge." *Id.* at 856.

In this case, the mining companies have not exhausted their tribal court remedies. Instead, the mining companies chose to file actions in federal district court seeking to enjoin the Navajo Tribal Court from asserting jurisdiction over the Navajo Court Plaintiffs' claims. *See Iowa Mut.*, 480 U.S. at 17 ("At a minimum, exhaustion of tribal remedies means that tribal appellate courts must have the opportunity to review the determinations of the lower tribal courts."). Thus, unless an exception to the tribal exhaustion requirement applies, the district court was obligated to abstain from ruling on the tribal court's jurisdiction over the Navajo Court Plaintiffs' common law claims.

An exception to the tribal exhaustion requirement exists where: (1) an assertion of tribal jurisdiction is motivated by a desire to harass or is conducted in bad faith; (2) tribal court jurisdiction patently would violate express jurisdictional prohibitions; (3) exhaustion would be futile because of the lack of an adequate opportunity to challenge the tribal court's jurisdiction; or (4) no federal grant authorizes tribal governance of nonmembers' conduct on land covered by *Montana*'s main rule. *See Strate v. A-1 Contractors*, ___ U.S. ___, 117 S. Ct. 1404, 1416 n.14 (1997); *National Farmers*, 471 U.S. 845 at 856 n.21. In this case, the parties only dispute the applicability of the "express jurisdictional prohibition" exception to tribal court jurisdiction. "A substantial showing must be made by the party seeking to invoke [the 'express jurisdictional prohibition'] exception to

the tribal exhaustion rule." *Kerr-McGee Corp. v. Farley ("Farley")*, 115 F.3d 1498, 1502 (10th Cir. 1997). "[T]ribal courts rarely lose the first opportunity to determine jurisdiction because of an 'express jurisdictional prohibition.'" *Id.*

II. The District Court's Orders

In this case, the district court's orders appear to hold that Price-Anderson constitutes an express prohibition of tribal court jurisdiction. The district court denied the mining companies' requests for preliminary injunctions "except to the extent that [the Navajo Court Plaintiffs] seek relief based upon the Price-Anderson Act in tribal court." The district court also stated that it did not determine whether Price-Anderson had any application to the claims asserted by the Navajo Court Plaintiffs.

The mining companies have appealed that portion of the district court's orders that allow the Navajo Court Plaintiffs to pursue claims in Navajo Tribal Court other than Price-Anderson claims. The mining companies assert that the Navajo Court Plaintiffs are barred from pursuing any claims in Navajo Tribal Court because the Navajo Court Plaintiffs' claims arise from a nuclear tort and fall within the ambit of Price-Anderson.

The Navajo Court Plaintiffs, on the other hand, have not appealed the district court's rulings that Price-Anderson constitutes an express prohibition of tribal court jurisdiction. Rather, the Navajo Court Plaintiffs seek to affirm that portion of the district court's orders that allow them to pursue claims other than Price-Anderson claims in Navajo Tribal Court. The Navajo Court Plaintiffs contend that their claims are based on Navajo common law and do not implicate Price-Anderson.

It is unclear why the Navajo Court Plaintiffs have not appealed the district court's rulings that Price-Anderson constitutes an express jurisdictional prohibition that prevents

the Navajo Tribal Court from determining its jurisdiction over such claims. Nevertheless, because of the important comity considerations involved, we *sua sponte* examine whether Price-Anderson constitutes an express prohibition of tribal court jurisdiction. *See Stone v. City and County of San Francisco,* 968 F.2d 850, 855 (9th Cir. 1992) ("Issues touching on federalism and comity may be considered *sua sponte*.").[1]

As the following discussion demonstrates, we conclude that Price-Anderson does not contain an express jurisdictional prohibition barring the Navajo Tribal Court from determining its jurisdiction over the Navajo Court Plaintiffs' claims. Therefore the mining companies, before proceeding in federal court, are obligated to first exhaust their tribal court remedies.

---

[1]Our decision to review this issue *sua sponte* is further supported by: (1) the Tenth Circuit's recent decision in *Farley,* 115 F.3d at 1505, which expressly rejected the claim that Price-Anderson constitutes an express jurisdictional prohibition; and (2) the district court's misplaced reliance on *UNC Resources, Inc. v. Benally,* 518 F. Supp. 1046 (D. Ariz. 1981), in considering the tribal exhaustion doctrine.

In *Benally*, a corporation operating a uranium mill near the Navajo reservation brought an action in federal district court to enjoin several members of the Navajo Nation from proceeding in Navajo Tribal Court on civil actions alleging personal injuries and property damage arising from the corporation's activities. *Id.* at 1048. The district court concluded that the tribal court had no jurisdiction. *Benally* is not dispositive, however, because it was decided before the Supreme Court announced the tribal exhaustion doctrine in *National Farmers*. Moreover, the conduct at issue in Benally took place off the reservation, whereas in this case the alleged conduct took place on the Navajo Nation Reservation. Tribal jurisdiction applies more clearly to conduct occurring on reservation lands. *See Iowa Mut.*, 480 U.S. at 18 ("Tribal authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty.") (emphasis added); *Crawford,* 947 F.2d at 1408 ("When the dispute is a 'reservation affair' . . . there is no discretion not to defer.").

III. Price-Anderson

The mining companies assert that Price-Anderson and its legislative history mandate exclusive federal court jurisdiction for claims arising from "nuclear incidents." The mining companies also assert that we may infer an express jurisdictional prohibition. These contentions are not persuasive.

Before 1954, a federal monopoly existed over the use, control, and ownership of nuclear technology. *Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n,* 461 U.S. 190, 206 (1983). In 1954, however, Congress passed the Atomic Energy Act to encourage the private sector to become involved in the development of atomic energy under federal regulation. *Id.* at 206-07.

In 1957, Congress enacted Price-Anderson. Price-Anderson amended the Atomic Energy Act by creating specific protections for the nuclear industry from tort liability. *See Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 251 (1984). Price-Anderson contains three distinct elements. First, it sets a ceiling on the aggregate damage award for nuclear tort claims that can be imposed against an entity involved in the use or handling of radioactive material. *In re TMI Litig. Cases Consol. II,* 940 F.2d 832, 852 (3d Cir. 1991). Second, it indemnifies any entity exposed to potential liability for activity resulting in a nuclear incident, even if the entity did not directly participate in the activity. *Id.* Third, Price-Anderson established an indemnification program through which the federal government would require entities involved in nuclear activities to obtain private insurance to a certain level, and then the federal government would pay all public liability claims above that liability ceiling. *Farley,* 115 F.3d at 1503.

Until amended in 1988, Price-Anderson's provisions regarding nuclear tort litigation did not apply unless and until the Nuclear Regulatory Commission ("NRC") determined that

an "extraordinary nuclear occurrence" had transpired. *O'Conner v. Commonwealth Edison Co.*, 13 F.3d 1090, 1095-96 (7th Cir. 1994). The 1988 amendments to Price-Anderson expanded its reach to include all "public liability actions" and eliminated the requirement that the NRC designate an extraordinary nuclear occurrence. 42 U.S.C. § 2210(n)(2). *See also* S. Rep. No. 218, 100th Cong., 1st Sess. 2, at 13 (1987) ("Any suit asserting public liability shall be deemed to be an action arising under the Price-Anderson Act."); H.R. Rep. No. 104, 100th Cong., 1st Sess., pt. 1 (same).

Price-Anderson states:

> With respect to any public liability action arising out of or resulting from a nuclear incident, the United States district court in the district where the nuclear incident takes place . . . shall have original jurisdiction without regard to the citizenship of any party or the amount in controversy. Upon motion of the defendant . . . any such action pending in any State court . . . or United States district court shall be removed or transferred to the United States district court having venue under this subsection.

42 U.S.C. § 2210(n)(2). Price-Anderson defines "public liability action" as "any suit asserting public liability." *Id.* § 2014(hh). "Public liability means any legal liability arising out of or resulting from a nuclear incident." *Id.* § 2014(w). A "nuclear incident means any occurrence . . . within the United States causing . . . bodily injury, sickness, disease, or death . . . arising out of or resulting from the radioactive,

toxic, explosive, or other hazardous properties of source,[2] special nuclear, or byproduct material."[3] *Id.* § 2014(q).

"Although the public liability cause of action is built around preexisting state law, it contains some distinctively federal elements as well." *O'Conner*, 13 F.3d at 1096; see also 42 U.S.C. § 2014(hh) ("The substantive rules for decision in [a public liability] action shall be derived from the law of the State in which the nuclear incident involved occurs, unless such law is inconsistent with the provisions of [42 U.S.C. § 2210]."). For example, Price-Anderson as amended in 1988 provides the limitations period for public liability actions, 42 U.S.C. § 2210(n)(1), provides for venue, *id.* § 2210(n)(2), limits the availability of punitive damages in an action arising out of an extraordinary nuclear occurrence, *id.* § 2210(s), and mandates the waiver of normally-available defenses in the case of extraordinary nuclear occurrences. *Id.* § 2210(n)(1).

IV. Price-Anderson does not Constitute an Express Jurisdictional Prohibition

One exception to the tribal exhaustion requirement calls for an *express* jurisdictional prohibition. *See National Farmers*, 471 U.S. at 857 n.21. This exception rarely applies. *See Farley*, 115 F.3d at 1502 (noting that a tribal court "rarely" loses the opportunity to determine its jurisdiction because of an express jurisdictional prohibition). "Civil jurisdiction over the activities of non-Indians on reservation lands 'presumptively lies in the tribal courts unless *affirmatively* limited by a specific treaty provision or federal

---

[2] "[S]ource material means (1) uranium, thorium, . . . or (2) ores containing one or more of the foregoing materials." 42 U.S.C. § 2014(z).

[3] "[B]yproduct material" includes "the tailings or wastes produced by the extraction or concentration of uranium or thorium from any ore processed primarily for its source material content." 42 U.S.C. § 2014(e).

statute.'" *Stock West, Inc. v. Confederated Tribes of the Colville Reservation*, 873 F.2d 1221, 1228 (9th Cir. 1989) (emphasis added) (quoting *Iowa Mut.*, 480 U.S. at 18).

Price-Anderson contains no such *express* prohibition of tribal court jurisdiction. Price-Anderson provides for *concurrent* rather than exclusive jurisdiction over claims arising from nuclear incidents. It merely grants defendants the *right*, rather than the obligation, to remove such cases to federal court. *See* 42 U.S.C. § 2210(n)(2) ("Upon motion of the defendant . . . any such action pending in any State court . . . shall be removed or transferred to the United States district court having venue under this subsection.").[4]

In *Farley*, the Tenth Circuit held that Price-Anderson does not constitute an express jurisdictional prohibition. In that case, certain members of the Navajo Nation filed an action in the Navajo Tribal Court against two mining companies. The mining companies had conducted operations on the Navajo Nation Reservation between 1952 and 1973. *Farley*, 115 F.3d at 1500. The plaintiffs alleged that the mining companies' mill released vast quantities of radioactive and toxic materials, which caused injuries. *Id.* The mining companies, without answering the tribal court complaint, filed an action in federal district court seeking to enjoin the suit from proceeding in the tribal court. *Id.* The mining

[4]The mining companies' reliance on *United States v. White Mountain Apache Tribe*, 784 F.2d 917 (9th Cir. 1986) and *United States v. Yakima Tribal Court*, 806 F.2d 853 (9th Cir. 1986) is misplaced. In *White Mountain*, we stated: "There is no point in requiring exhaustion . . . because tribal court jurisdiction is clearly foreclosed by the sovereign immunity of the United States." *White Mountain*, 784 F.2d at 920 n.10; *see also Yakima*, 806 F.2d at 861 (following *White Mountain*). Unlike *White Mountain* and *Yakima*, in this case, Navajo Tribal Court jurisdiction is not "clearly foreclosed" by Price-Anderson. Moreover, it is for the Navajo Tribal Court to first determine whether the Navajo Court Plaintiffs have even asserted Price-Anderson claims.

companies asserted that Price-Anderson constitutes an express jurisdictional prohibition of tribal court suits involving nuclear torts. Thus, they argued that they had no obligation to exhaust tribal court remedies. *Id.*

The district court disagreed and stated that the "Price-Anderson Act and its amendments are devoid of any mention of 'Indians,' 'tribes,' or 'tribal-court jurisdiction.'" *Kerr-McGee Corp. v. Farley*, 915 F. Supp. 273, 277 (D.N.M. 1995), *aff'd*, 115 F.3d 1498 (10th Cir. 1997). The district court further noted:

> The Price-Anderson Act does not affirmatively limit tribal court jurisdiction. Although Congress has plenary power to define the jurisdiction of tribal courts, it did not exercise that power, when it drafted the Price-Anderson Act. The Act makes no reference to Indians and nothing in the legislative history suggests any intent to render inoperative the established policy promoting tribal self-government.

915 F. Supp. at 280 (citation omitted).

The Tenth Circuit affirmed the district court's decision to stay all proceedings before it until the mining companies exhausted their tribal court remedies. The Tenth Circuit noted: "The 1988 amendments [to Price-Anderson] do not explicitly create *exclusive* federal court jurisdiction over nuclear incident litigation." *Farley*, 115 F.3d at 1504.[5]

[5]At oral argument, the mining companies contended that the Supreme Court's recent decision in *Strate* controlled this case. In *Strate*, the Supreme Court found that, absent a treaty or statute, an Indian tribe lacked jurisdiction over a dispute between nonmembers of the tribe when that dispute arose from an accident occurring on a state highway within the reservation. *Strate*, 117 S. Ct. at 1407-08. The Court noted that, when a tort occurs on alienated land, the tribal court will have jurisdiction over the

The mining companies contend that cases interpreting the 1988 Price-Anderson amendments recognize the Act's exclusivity. *See Nieman v. NLO, Inc.*, 108 F.3d 1546, 1553 (6th Cir. 1997) ("[A plaintiff] can sue under the Price-Anderson Act, as amended, or not at all."); *In re TMI Litig.*, 940 F.2d at 854 ("A claim growing out of any nuclear incident is compensable under the terms of the [1988

---

claim only where the tribe regulates one of two situations discussed in *Montana v. United States*, 450 U.S. 544, 67 L. Ed. 2d 493, 101 S. Ct. 1245 (1981): (1) consensual relationships between nonmembers and the tribe, or (2) conduct which "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Montana*, 450 U.S. at 566.

We find *Strate* inapposite to the facts of this case because the incident in *Strate* arose from a traffic accident on a state highway within the tribe's reservation. The *Strate* Court placed great emphasis on the fact that the state highway was open to the public and controlled and maintained by the state. *Strate*, 117 S. Ct. at 1414. Conversely, in this case the Navajo Nation retained tribal sovereignty over the land the mining companies occupied, which land was neither open to the public nor controlled or maintained by any entity other than the tribe. The *Strate* Court expressly declined to address cases, like the present one, where the disputed tort involved nonmembers of the tribe and occurred on tribal land. *See id.* at 1408 ("We express no view on the governing law or proper forum when an accident occurs *on a tribal road* within a reservation.") (emphasis added). Because this case is distinguishable from *Strate*, we need not consider whether a *Montana* exception applies. It seems indisputable, however, that a claim involving uranium contamination poses a danger to the 'health or welfare of the tribe.'

The dissent contends that *Burlington N. R.R. Co. v. Red Wolf*, 106 F.3d 868 (9th Cir. 1996), *vacated*, 118 S. Ct. 37 (1997) has expanded *Strate*, and that those two cases control the outcome here. In *Red Wolf*, we held that a railroad sued for a tort arising on a reservation must exhaust its tribal court remedies before a district court can exercise jurisdiction. The Supreme Court vacated our decision in *Red Wolf* and instructed us to reconsider our holding in light of *Strate*. But here, unlike in *Red Wolf*, there is no question that the Navajo Nation retained its sovereignty over the mine sites.

Amendments to the Act] or *it is not compensable at all.*"); *O'Conner*, 13 F.3d at 1099 ("The broad definition of 'public liability action' embodied in the Price-Anderson Act implies that Congress has exercised power under Article I and has enacted a new and independent, indeed exclusive, cause of action."). These cases are inapplicable, however, because they only address federal-state jurisdictional issues relating to Price-Anderson. They do not address Indian tribes or tribal sovereignty.

"Indian tribes occupy a unique status under our law." *National Farmers*, 471 U.S. at 851. "The condition of the Indians in relation to the United States is perhaps unlike that of any other two people in existence . . . . The relation of the Indians to the United States is marked by peculiar and cardinal distinctions which exist nowhere else." *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 15-16 (1831).

Comity concerns differ between federal-state and federal-tribal jurisdiction:

> As in cases raising comity concerns regarding federal-state jurisdiction, comity concerns in federal-tribal jurisdiction arise out of mutual respect between sovereigns. In the realm of federal-tribal jurisdiction, however, Congress has expressed an additional interest in promoting the development of tribal sovereignty. The Supreme Court has recognized this congressional intent and assiduously advocated federal abstention in favor of tribal courts.

Smith v. Moffett, 947 F.2d 442, 445 (10th Cir. 1991). Thus, even if Price-Anderson preempts *state court* jurisdiction -- still an open question in this circuit -- there is no express prohibition of *tribal court jurisdiction*.

The Supreme Court has also recognized that comity concerns differ between federal-state and federal-tribal jurisdiction. In *Iowa Mut. Ins. Co. v. LaPlante*, the Supreme Court refused to infer that the diversity statute, 28 U.S.C. § 1332, divested tribal courts of jurisdiction in diversity actions. *Iowa Mut.*, 480 U.S. at 17-18. The Supreme Court stated that § 1332 "makes no reference to Indians and nothing in the legislative history suggests any intent to render inoperative the established federal policy promoting tribal self-government." *Id.* at 17.

The Supreme Court noted: "'Because the Tribe retains all inherent attributes of sovereignty that have not been divested by the Federal Government, the proper inference from silence . . . is that the sovereign power . . . remains intact.'" *Id.* at 18 (quoting *Merrion v. Jicarilla Apache Tribe,* 455 U.S. 130, 149 n.14 (1982)). Thus, the Court held that "in the absence of any indication that Congress intended [§ 1332] to limit the jurisdiction of the tribal courts, we decline . . . to hold that tribal sovereignty can be impaired in this fashion." *Id.*

We have also refused to infer a prohibition of tribal court jurisdiction absent express language in addressing 28 U.S.C. § 1355. *United States v. Plainbull,* 957 F.2d 724 (9th Cir. 1992). Section 1355 states: "The district courts shall have original jurisdiction, exclusive of the courts of the States" over certain actions brought by the federal government. 28 U.S.C. § 1335 (emphasis added). We noted that the plain language of § 1355 "only grants the district court original jurisdiction 'exclusive of the courts of the States,' not exclusive of all other courts that would otherwise have had jurisdiction. Since a tribal court is not a state court, we hold that it does not fall within the exclusive jurisdiction provision of section 1355." *Id.*

The mining companies rely on *Lower Brule Constr. Co. v. Sheesley's Plumbing & Heating Co.*, 84 B.R. 638 (D.S.D. 1988) in asserting that tribal jurisdiction can be

limited absent an express jurisdictional prohibition. This claim is also without merit. In *Brule*, the Tribal Housing Authority asserted that the tribal court had jurisdiction over a bankruptcy action. *Id.* at 640. The district court disagreed, however, and concluded that the tribal court's civil jurisdiction was "unlimited only in relation to matters of Indian self-government." *Id.* at 641. The district court reasoned that requiring tribal courts to perform as bankruptcy courts "would not promote self-government among the Indian tribes, even assuming that a body of 'bankruptcy' law existed in tribal court." *Id.* The court further noted: "The Bankruptcy Code makes no reference to Indians or tribal courts and there is no Congressional grant of authority for Indian tribal courts to assume jurisdiction over bankruptcy proceedings." *Id.* at 642.

Brule is of limited guidance in this case. First, we have already determined that an express jurisdictional prohibition is required to limit tribal court jurisdiction. See *Plainbull,* 957 F.2d at 726; *see also Farley,* 115 F.3d at 1505 ("Simply put, 'exclusive jurisdiction' is not conferred unless conferred explicitly."). Second, the tribe in Brule did not allege that it had a body of bankruptcy law which it could apply. In this case, however, the Navajo Court Plaintiffs have apparently asserted claims based on Navajo common law - an area clearly within the Navajo Tribal Court's expertise.[6]

Even if the issue were ambiguous, federal courts are "required to construe ambiguity in statutes on Indian affairs in favor of preserving Indian sovereignty." *Poodry v. Tonawanda Band of Seneca Indians,* 85 F.3d 874, 889 (2d Cir.), *cert. denied*, 117 S. Ct. 610 (1996). In this case,

---

[6]The mining companies also contend that Price-Anderson is the exclusive method for bringing nuclear tort claims because Price-Anderson provides a means of consolidating claims and ensuring a fair and equitable distribution of funds to all those affected by a nuclear incident. This claim is unavailing because it merely seeks to "infer" a jurisdictional prohibition where no "express" jurisdictional prohibition exists.

members of the Navajo Nation have alleged claims for personal injury and wrongful death arising from activity occurring on the Navajo Nation Reservation. Allowing the Navajo Tribal Court to determine its jurisdiction over these claims will preserve Indian sovereignty.

CONCLUSION

For the reasons stated above, we hold that Price-Anderson does not constitute an express jurisdictional prohibition that prevents the Navajo Tribal Court from determining its jurisdiction over the Navajo Court Plaintiffs' claims for personal injury and wrongful death arising from activities occurring on the Navajo Nation Reservation.[7] Accordingly, we reverse that portion of the district court's orders granting the mining companies' requests for preliminary injunctions. We affirm that portion of the district court's orders denying the mining companies' requests for preliminary injunctions.

Because the Navajo Tribal Court is to determine in the first instance whether it has jurisdiction over the Navajo Court Plaintiffs' claims, we remand this matter to the district court to either enter a stay of all proceedings or dismiss the complaint without prejudice pending the exhaustion of tribal court remedies. *See Iowa Mut.*, 480 U.S. at 20 n.14.

AFFIRMED in part, REVERSED in part, and REMANDED.

---

[7]In holding that Price-Anderson does not constitute an express jurisdictional prohibition, we need not consider the Navajo Court Plaintiffs' alternative claim that Price-Anderson does not apply because the mining companies had no indemnity agreement with the federal government. *See Silkwood*, 464 U.S. at 251-52 n.12 ("Government indemnification is available only to those required to maintain financial protection . . . and the liability limitation applies only to those who are indemnified.").

KLEINFELD, Circuit Judge, dissenting:

I respectfully dissent.

In these two lawsuits, three Navajo Indians sued El Paso Natural Gas Company, a Delaware corporation, and Cyprus Foote Mineral Company, a Pennsylvania corporation, in Navajo tribal court. The Richards case alleged death from cancer caused by radiation. The Neztsosies' case alleged that the Neztsosies and their cattle were poisoned by drinking water contaminated with radiation and heavy metals. The uranium mining occurred many years ago. In ruling on a motion for preliminary injunction, the district court ruled that tribal court proceedings were enjoined as to Price-Anderson claims, but not as to other claims, and did not rule on whether the Price-Anderson Act applied to claims asserted by plaintiffs in tribal court. Plaintiffs did not appeal the injunction against litigating Price-Anderson claims in tribal court, so it should be treated as law of the case. The corporations appealed denial of the preliminary injunction as to all claims not covered by Price-Anderson. The majority opinion lets the plaintiffs sue the corporations in tribal court on all their claims, Price-Anderson or not. That is incorrect.

The Price-Anderson Act, as originally enacted in 1957, did not create a federal tort cause of action, nor confer jurisdiction on the federal courts. *Kiick v. Metropolitan Edison Co.*, 784 F.2d 490, 493 (3d Cir. 19[illegible]; *Stibitz v. General Pub. Util. Corp.*, 746 F.2d 993, 997 (3d Cir. 1984). Congress amended the Act to expand federal jurisdiction to include claims arising from any "nuclear incident." *See O'Conner v. Commonwealth Edison Co.*, 13 F.3d 1090, 1096 (7th Cir. 1994).

The statute provides that federal district courts have original jurisdiction with respect to "any public liability action arising out of or resulting from a nuclear incident." 42 U.S.C. § 2210(n)(2). Cases brought in state courts "shall be

removed" to federal court. *Id.* "Public liability" in this statute means "any legal liability arising out of or resulting from a nuclear incident." 42 U.S.C. § 2014(w). A "nuclear incident" was defined as any occurrence arising out of the hazardous properties of nuclear materials that causes sickness, personal injury or death:

> any occurrence, including an extraordinary nuclear occurrence, within the United States causing, within or outside the United States, bodily injury, sickness, disease, or death, or loss of or damage to property, or loss of use of property, arising out of or resulting from the radioactive, toxic, explosive, or other hazardous properties of source, special nuclear, or byproduct material.

42 U.S.C. § 2014(q). I do not think there are any actions that can arise out of sickness or death resulting from the hazardous properties of nuclear material that are not Price-Anderson actions. That should be the end of the case, because the plaintiffs did not appeal the determination by the district court that Price-Anderson actions could not be asserted in tribal court.

Plaintiffs' claims for injury and death resulting from nuclear materials left over from uranium mining were Price-Anderson claims or nothing, and Price-Anderson claims must be brought in federal district court. Congress did not leave room for non-federal tribunals to interfere with nuclear development that Congress favored, or foster nuclear development it disfavored. Two circuits have held that the federal cause of action is exclusive. The Third Circuit stated:

> Congress clearly intended to supplant all possible state causes of action when the factual prerequisite of the statute are met . . . .

> Congress clearly considered the decisions of our court holding that Congress had not intended to create a federal cause of action for cases not based upon an extraordinary nuclear occurrence . . . . Congress then provided, in the [1988] Amendments Act, the clearest expression of intent that there be a federal cause of action arising directly under the Act.

In re TMI Cases Consolidated, 940 F.2d 832, 857 (3d Cir. 1991). The court concluded, "After the Amendments Act, no state cause of action based on public liability exists. A claim growing out of any nuclear incident is compensable under the terms of the Amendments Act or *it is not compensable at all.*" *Id.* at 854 (emphasis in original). In *O'Conner v. Commonwealth Edison Co.,* 13 F.3d 1090 (7th Cir. 1994), the Seventh Circuit similarly held: "A claim growing out of any nuclear incident is compensable under [Price-Anderson] or it is not compensable at all." *O'Conner,* 13 F.3d at 1099.

The majority should not have reached over the head of the parties to reverse on a matter not even raised, whether prosecution of Price-Anderson claims in tribal court should have been enjoined.

Because (1) it is law of the case, not appealed, that the tribal court lacks jurisdiction over Price-Anderson claims, and (2) there are no claims that can be made that are not Price-Anderson claims, it necessarily follows that (3) there are no claims that can be made in tribal court. There can be no claim for which exhaustion in tribal court can be required.

We made a somewhat similar exhaustion doctrine mistake in *Burlington Northern Railroad Co. v. Red Wolf,* 106 F.3d 868 (9th Cir.), vacated 118 S. Ct. 37, 139 L. Ed. 2d 5 (1997). The Supreme Court made short work of our error, vacating it in a memorandum decision for further consideration in light of *Strate v. A-1 Contractors,* 117 S. Ct. 1404 (1997). The Court held in *Strate,* 117 S. Ct. 1404

(1997), that exhaustion in tribal court is not required, where "it is plain that no federal grant of authority provides for tribal governance of nonmembers' conduct":

> When, as in this case, it is plain that no federal grant provides for tribal governance of nonmembers' conduct . . . covered by [*Montana v. United States*,' 450 U.S. 544 (1981)] main rule, it will be equally evident that tribal courts lack adjudicatory authority over disputes arising from such conduct. As in criminal proceedings, state or federal courts will be the only forums competent to adjudicate those claims. Therefore, when tribal-court jurisdiction over an action such as this one is challenged in federal court, the otherwise applicable exhaustion requirement, must give way, for it would serve no purpose other than delay.

Id. 1416 n.14. The majority has in footnote 5 attempted to limit *Strate* to its facts, as we might with a poorly reasoned decision of our own that had not stood up well over time. We cannot do that with a Supreme Court decision.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

EL PASO NATURAL GAS COMPANY,
a Delaware Corporation,
Plaintiff-Appellant,
v.

LAURA NEZTSOSIE; ARLINDA NEZTSOSIE,
Defendants-Appellees.

No. 96-17121
DC No. CV-96-00049-RGS

CYPRUS FOOTE MINERAL COMPANY,
a Pennsylvania Corporation;
CYPRUS AMAX MINERAL COMPANY,
a Delaware Corporation,
Plaintiffs-Appellants,
v.

ZONNIE MARIE DANDY RICHARDS,
individually and as representative
of the Estate of Harold J.Richards, Sr.,
Defendant-Appellee.

No. 96-17139
DC No. CV-96-01524-RGS

Appeals from the United States District Court
for the District of Arizona

April 27, 1998

Before: Judges Harry Pregerson, Warren J. Ferguson, and Andrew J. Kleinfeld, Circuit Judges

ORDER AMENDING OPINION AND DENYING PETITION FOR REHEARING EN BANC

The opinion filed on February 11, 1998 is amended as follows:

At Slip. Op. p. 1284, first full paragraph, lines 3-8:

Replace

"(2) tribal court jurisdiction "is patently violative of express jurisdictional prohibitions"; or (3) exhaustion would be futile because of the lack of an adequate opportunity to challenge the tribal court's jurisdiction. *National Farmers*, 471 U.S. 845 at 857 n.21 (emphasis added)."

with

"(2) tribal court jurisdiction patently would violate express jurisdictional prohibitions; (3) exhaustion would be futile because of the lack of an adequate opportunity to challenge the tribal court's jurisdiction; or (4) no federal grant authorizes tribal governance of nonmembers' conduct on land covered by Montana's main rule. *See Strate v. A-1 Contractors*, U.S. , 117 S. Ct. 1404, 1416 n.14 (1997); *National Farmers*, 471 U.S. at 856 n.21."

At Slip Op. p. 1291, n.5, first full paragraph, lines 2-3:

Replace

"*Strate v. A-1 Contractors*, U.S. , 117 S. Ct. 1404 (1997)"

with

"*Strate*"

At Slip Op. p. 1291, n.5, first full paragraph, line 7:

Replace

"*Id.* at 1407-08."

with

"*Strate*, 117 S. Ct. at 1407-08."

With these amendments, Judges Pregerson and Ferguson voted to deny the petition for rehearing, Judge Pregerson voted to reject the suggestion for rehearing en banc and Judge Ferguson so recommends. Judge Kleinfeld voted to grant the petition for rehearing and to accept the suggestion for rehearing en banc.

The full court has been advised of the en banc suggestion and no judge has requested a vote on it.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

(8)

Supreme Court, U.S.
FILED
DEC 8 1998
CLERK

No. 98-6

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

EL PASO NATURAL GAS COMPANY, CYPRUS FOOTE MINERAL COMPANY, AND CYPRUS AMAX MINERALS COMPANY,

PETITIONERS,

v.

LAURA NEZTSOSIE; ARLINDA NEZTSOSIE; AND ZONNIE MARIE DANDY RICHARDS, INDIVIDUALLY AND AS REPRESENTATIVE OF THE ESTATE OF HAROLD J. RICHARDS, SR.,

RESPONDENTS.

On A Writ Of Certiorari To The
United States Court Of Appeals
For The Ninth Circuit

BRIEF FOR PETITIONERS

Lynn H. Slade
Walter E. Stern
MODRALL, SPERLING, ROEHL, HARRIS & SISK, P.A.
500 Fourth Street, N.W.
NationsBank Tower, Suite 1000
Albuquerque, NM 87102
(505) 848-1800

James R. Atwood*
Richard A. Meserve
COVINGTON & BURLING
1201 Pennsylvania Ave., N.W.
P.O. Box 7566
Washington, D.C. 20044-7566
(202) 662-6000

Tom Galbraith
Dawn M. Bergin
LEWIS & ROCA
40 North Central Avenue
Phoenix, AZ 85004-4429
(602) 262-5311

Attorneys for Petitioners

* Counsel of Record

54 pp

QUESTIONS PRESENTED

1. Where non-Indians have been sued in tribal court solely under tribal law causes of action that have been preempted by federal law, must those parties exhaust all tribal remedies before a federal court may consider the preemption issue?

2. Where a tribal court asserts adjudicatory jurisdiction against non-Indians involving a subject over which the tribe has no regulatory jurisdiction, must those parties exhaust all tribal remedies before seeking relief in federal court?

3. Did the court of appeals improperly reverse, *sua sponte*, an injunction from which the enjoined parties had not appealed?

PARTIES TO THE PROCEEDING

All the parties in the court of appeals are identified in the caption.

STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

The Rule 29.6 statement in the petition for writ of certiorari is incorporated herein by reference for petitioners Cyprus Foote Mineral Company and Cyprus Amax Minerals Company.

As for El Paso Natural Gas Company, El Paso Energy Corporation became the parent of that petitioner on August 1, 1998. El Paso Natural Gas Company's non-wholly owned subsidiaries currently include:

Aguaytia Energy L.L.C.
Bear Creek Storage Company
Berkshire Feedline Acquisition L.P.
Berkshire Power Company L.L.C.
Border Gas Inc.
CAPEX S.A.
Central Costanera, S.A.
Central Termoelectrica Buenos Aires, S.A.
Compania Samalayuca II, S.A. de C.V.
Companias Asociadas Petroleraos S.A.
Cornerstone/Merit Joint Venture
Coyote Gas Treating Limited Liability Company
Cross Country Development L.L.C.

Delos Offshore Company, L.L.C.
ECK Generating s.r.o.
El Paso Amazonas Energia Ltda.
El Paso Energy Argentina Limitada S.A.
El Paso Pakistan Power (Private) Limited
El Paso Rio Claro Ltda.
El Paso Rio Grande Ltda.
EMA Power Kft.
Energeticke Centrum Kladno s.r.o.
Energy Equity EPIC (Sengkang) Pty. Limited
EPIC Energy Amazon Company
Epic Energy Australia Trust
Epic Energy (Australia) Nominees Pty. Ltd.
Epic Energy Pty. Limited
EPIC Gas Transportes S.A.
Ewing Bank Gathering Company, L.L.C.
Fauji Kabirwala Power Company Limited
Flextrend Development Company, L.L.C.
Garvin County Pipeline
Gas de Chile S.A.
Gasoducto Transandino Argentina S.A.
Gasoducto Transandino S.A.
Gasoductos de Chihuahua, S. de R.L. de C.V.
Green Canyon Pipe Line Company, L.L.C.
Gulf Processing Partners
High Island Offshore System
Interenergy Company
Inversiones EPEC Gas (Chile) Ltda.
KEI Energy Private Ltd.
Latin America Capital L.L.C.
Leviathan Gas Pipeline Partners, L.P.
Leviathan Oil Transport Systems, L.L.C.

Manta Ray Gathering Company, L.L.C.
Manta Ray Offshore Gathering Company, L.L.C.
MASSPOWER
Matra Powerplant Holding B.V.
Mountain Creek Joint Venture
Nautilus Pipeline Company, L.L.C.
Neptune Pipeline Company, L.L.C.
Oasis Pipe Line Company
Ocean Breeze Pipeline Company, L.L.C.
Orange Cogeneration GP II, Inc.
Orange Cogeneration Limited Partnership
Pasotronica, S.A. de C.V.
Polk Power GP II, Inc.
Polk Power Partners, L.P.
Portland Natural Gas Transmission System
Poseidon Oil Pipeline Company, L.L.C.
Poseidon Pipeline Company, L.L.C.
PT Energi Sengkang
Sailfish Pipeline Company, L.L.C.
SAM II Equity Funding, L.L.C.
Samalayuca Holding Partnership
Samalayuca II Management L.L.C.
Samalayuca II Management, S. de R.L. de C.V.
Servicios El Paso, S.R.L.
Stingray Holding, L.L.C.
Stingray Pipeline Company
Sulawesi Energy Pty. Limited
Tarpon Transmission Company
Tembec Company
Texam Offshore Gas Transmission, L.L.C.
The Maple Gas Development Corporation
The Western Market Center Joint Venture

Transco Hydrocarbons Company, L.L.C.
Transco Offshore Pipeline Company, L.L.C.
Triunion Energy Company
U-T Offshore System (Delaware GP)
VEN Field Services Company
VK Deepwater Gathering Company, L.L.C.
VK-Main Pass Gathering Company, L.L.C.
Weilkopolska Energia, S.A.
West Cameron Dehydration Company, L.L.C.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING ii

STATEMENT PURSUANT TO SUPREME COURT RULE 29.6 ii

TABLE OF CONTENTS vi

TABLE OF AUTHORITIES ix

OPINIONS BELOW 1

JURISDICTION 1

STATUTES INVOLVED 1

STATEMENT 2

A. *El Paso v. Neztsosie* -- Tribal and Federal District Court Proceedings 2

B. *Cyprus v. Richards* -- Tribal and Federal District Court Proceedings 4

C. The Court of Appeals 5

Page

SUMMARY OF ARGUMENT 7

ARGUMENT 9

I. Because the Atomic Energy Act and Price-Anderson Acts Provide the Exclusive Governing Law for Nuclear-Related Activities and Torts in the United States, Respondents' Tribal Law Claims Are Preempted. 9

A. The Atomic Energy Act of 1954 9

B. The Price-Anderson Act 11

C. The Price-Anderson Amendments Act of 1988 16

D. Preemption Under the Amendments Act . . 20

II. The Doctrine of Exhaustion of Tribal Remedies Does Not Require the Wasteful Exhaustion of Preempted Tribal Law Claims. 26

A. The Tribal Exhaustion Doctrine 26

B. The Teaching of *Strate* 29

C. The Application of *Strate* in the Context of Price-Anderson Claims 31

Page

III. The Ninth Circuit Improperly Reversed the District Court's Injunctive Orders from Which No Appeal Had Been Taken. 34

CONCLUSION 36

TABLE OF AUTHORITIES

Cases	Page
Alaska v. Native Village of Venetie Tribal Gov't, 118 S. Ct. 948 (1998)	35
Allen v. United States, 588 F. Supp. 247 (D. Utah 1984), *rev'd*, 816 F.2d 1417 (10th Cir. 1987)	24
BMW of North America, Inc. v. Gore, 517 U.S. 559 (1996)	24
Blue Legs v. Bureau of Indian Affairs, 867 F.2d 1094 (8th Cir. 1989)	25, 33
Bowen v. City of New York, 476 U.S. 467 (1986)	31
Brendale v. Confederated Tribes & Bands of Yakima Indian Nation, 492 U.S. 408 (1989)	32, 35
Colorado River Water Conservation District v. United States, 424 U.S. 800 (1976)	27-28
Crawford v. Genuine Parts Co., 947 F.2d 1405 (9th Cir. 1991)	28
Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993)	24

Duke Power Co. v. Carolina Environmental Study Group, 438 U.S. 59 (1978) 9-10, 12-13

Duro v. Reina, 495 U.S. 693 (1990) 32

Escondido Mutual Water Co. v. La Jolla Band of Mission Indians, 466 U.S. 765 (1984) 25

Federal Power Commission v. Tuscarora Indian Nation, 362 U.S. 99 (1960) 25

Hawaii Housing Authority v. Midkiff, 467 U.S. 229 (1984) 31

In re Hanford Nuclear Reservation Litigation, 1998 WL 775340 (E.D. Wash. Aug. 21, 1998) . 24

In re TMI Litigation Cases Consolidated II, 940 F.2d 832 (3d Cir. 1991) . . 6, 16, 17, 18, 21-23

Iowa Mutual Insurance Co. v. LaPlante, 480 U.S. 9 (1987) . . . . . *passim*

Kerr-McGee Corp. v. Farley, 115 F.3d 1498 (10th Cir. 1997), *cert. denied*, 118 S. Ct. 880 (1998) 21

Kiick v. Metropolitan Edison Co., 784 F.2d 490 (3d Cir. 1986) 16

Lazore v. C.I.R., 11 F.3d 1180 (3d Cir. 1993) 25

Lumber Industrial Pension Fund v. Warm Springs Forest Products Indus., 939 F.2d 683 (9th Cir. 1991) 25

Mathews v. Eldrige, 424 U.S. 319 (1976) 31

McKart v. United States, 395 U.S. 185 (1969) 31

Miller v. Butcher Distributors, 89 F.3d 265 (5th Cir. 1996) 34

Montana v. United States, 450 U.S. 544 (1981) 25, 29, 30

Morley Construction Co. v. Maryland Casualty Co., 300 U.S. 185 (1937) 34

National Farmers Union Insurance Cos. v. Crow Tribe of Indians, 471 U.S. 845 (1985) . . . *passim*

Nieman v. NLO, Inc., 108 F.3d 1546 (6th Cir. 1997) . 21

Northern States Power Co. v. Prairie Island Mdewakenton Sioux Indian Community, 991 F.2d 458 (8th Cir. 1993) 33

Northwest Airlines, Inc. v. County of Kent, Mich., 510 U.S. 355 (1994) 34

O'Conner v. Commonwealth Edison Co., 13 F.3d 1090 (7th Cir. 1994) 6, 18, 21, 22, 23

Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978) 32

Pacific Gas & Electric Co. v. State Energy Resources Conservation & Devel. Commission, 461 U.S. 190 (1983) 9, 10, 11, 20, 33

Reich v. Mashantucket Sand & Gravel, 95 F.3d 174 (2d Cir. 1996) 25

Reiter v. Cooper, 507 U.S. 258 (1993) 31

Roberts v. Florida Power & Light Co., 146 F.3d 1305 (11th Cir. 1998), *petition for cert. filed* (U.S. Oct. 17, 1998) (No. 98-640) 21, 22, 23

Rough Rock Community School v. Navajo Nation, SC-CV-06-94 (Navajo S. Ct. 1996) 24

Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978) 24

Sherman v. Community Consolidated Sch. District 21, 980 F.2d 437 (7th Cir. 1992) 34

Silkwood v. Kerr-McGee Corp., 464 U.S. 238 (1984) 11, 15-16, 24, 33

South Dakota v. Bourland, 508 U.S. 679 (1993) 24, 25, 32, 35

South Dakota v. Yankton Sioux Tribe, 118 S. Ct. 789 (1998) 25

Stone v. City & County of San Francisco, 968 F.2d 850 (9th Cir. 1992) 34-35

Strate v. A-1 Contractors, 520 U.S. 438 (1997) 5-6, 7-8, 27-33

Torres v. Oakland Scavenger Co., 487 U.S. 312 (1988) 34

UNC Resources, Inc. v. Benally, 518 F. Supp. 1046 (D. Ariz. 1981) 2

U.S. Department of Labor v. OSHRC, 935 F.2d 182 (9th Cir. 1991) 25

United States v. Lopez, 514 U.S. 549 (1995) 24

United States v. Yakima Tribal Court, 806 F.2d 853 (9th Cir. 1986) 23

Constitution, Statutes and Rules

U.S. Const. art. I, § 8, cl. 3 25

Atomic Energy Act of 1946, ch. 724, 60 Stat. 755. 9

Atomic Energy Act of 1954, ch. 1073,
68 Stat. 919 . . . . . 1, 2, 7, 9-11, 33

Energy Reorganization Act of 1974, 42 U.S.C.
§§ 5801 *et seq.* 10

Indian Civil Rights Act of 1968, 25 U.S.C.
§§ 1301 & 1302 . . . . . 24, 32

Price-Anderson Act of 1957, Pub. L. No.
85-256, 71 Stat. 576 (1957) 11-13, 17

Price-Anderson Amendments Act of 1988,
Pub. L. No. 100-408, 102 Stat.
1066 (1988) . . . . . *passim*

Pub. L. No. 87-615, 76 Stat. 409 (1962) 14

Pub. L. No. 89-210, 79 Stat. 855 (1965) 14

Pub. L. No. 89-645, 80 Stat. 891 (1966) 14-15

Pub. L. No. 94-197, 89 Stat. 111 (1975) 14, 20

Pub. L. No. 101-511, § 8077(c),
104 Stat. 1892 (1991) 32

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1331 27

Federal Rules of Appellate Procedure 3 & 4 34

7 N.N.C. § 253(2) 2

Resolution CF-19-80 (Navajo Tribal Council
Feb. 13, 1980) 2

Regulations

10 C.F.R. ch. 1 10

10 C.F. R. pt. 60 2

Legislative Materials

H.R. Rep. No. 83-2181 (1954) 9

H.R. Rep. No. 85-435 (1957) 12

H.R. Rep. No. 100-104 (1987) 17-18, 19, 21, 35

S. Rep. No. 85-296 (1957) 12, 13, 17, 26

S. Rep. No. 87-1677 (1962) 13

S. Rep. No. 89-1605 (1966) 14

S. Rep. No. 100-218 (1987) 16-17, 20, 21

Hearings before the Joint Committee on Atomic Energy on Governmental Indemnity for Private Licensees and AEC Contractors Against Reactor Hazards, 84th Cong., 2d Sess. (1956) 11

Hearings before the Joint Committee on Atomic Energy on Governmental Indemnity and Reactor Safety, 85th Cong., 1st Sess. (1957) 11

OPINIONS BELOW

The opinion of the court of appeals, as amended (App. 74a-96a), is reported at 136 F.3d 610. The order of the court of appeals amending its opinion, denying the petitions for rehearing en banc, and rejecting the suggestions for rehearing en banc (App. 97a-99a) is not separately reported. The decisions of the district court (App. 68a-73a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 11, 1998. Petitions for rehearing and suggestions for rehearing en banc were denied April 27, 1998. The petition for a writ of certiorari was filed June 26, 1998, and was granted on October 13, 1998. The jurisdiction of this Court rests upon 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Pertinent provisions of the Atomic Energy Act, as amended by the Price-Anderson Act and the Price-Anderson Amendments Act, 42 U.S.C. §§ 2012-2014, 2210, are set forth in the appendix to the petition for writ of certiorari (Pet. App. 34a-45a).

STATEMENT

A. *El Paso v. Neztsosie* -- Tribal and Federal District Court Proceedings

For several years beginning in 1956, El Paso Natural Gas Company (El Paso) conducted uranium mining on land located within the Navajo reservation in northeastern Arizona.[1] El Paso conducted these activities pursuant to federal mining permits, leases supervised by the Bureau of Indian Affairs, and a contract with the Atomic Energy Commission (AEC) and subject to the provisions of the Atomic Energy Act of 1954 (AEA), 42 U.S.C. §§ 2011-2297g-4. The AEC purchased El Paso's entire uranium production under the government's Domestic Uranium Program, 10 C.F.R. pt. 60 (1949 & 1958 supp.).

In April 1995, more than thirty years after the mining operations had terminated and El Paso had surrendered its leases, Laura and Arlinda Neztsosie filed suit against El Paso in Navajo tribal court.[2] The Neztsosies, members of the Navajo Nation, claimed personal injuries allegedly arising from radioactive contamination of water, air, and soil in the vicinity of El Paso's former operations. This contamination, they alleged, was caused by wastes that purportedly contained high concentrations of uranium, plutonium, thorium, and other

[1]The mining operations were in fact conducted by a former wholly-owned subsidiary of El Paso, but for convenience we refer to the parent company.

[2]The Navajo Nation Code currently provides for civil jurisdiction over any person, whether a tribal member or non-Indian, who "has caused an action to occur within the territorial jurisdiction of the Navajo Nation." 7 N.N.C. § 253(2). At the time of petitioners' operations within the reservation, however, the Navajo Nation did not claim adjudicatory jurisdiction over non-members. Such claims date from a tribal council resolution adopted in 1980, long after petitioners' mining and milling operations had ceased. Resolution CF-19-80 (Feb. 13, 1980); *see UNC Resources, Inc. v. Benally*, 518 F. Supp. 1046, 1049 (D. Ariz. 1981).

radioactive materials.

The Neztsosies alleged claims based solely on Navajo common law, including negligence, strict liability for an "abnormally dangerous activity," and "outrageous conduct." Both compensatory and punitive damages were sought. (App. 18a-27a) The Neztsosies did not plead any claims under the Price-Anderson Amendments Act, which -- as discussed below (pp. 16-19) -- is part of the AEA and provides an exclusive federal-law remedy for nuclear-related torts. 42 U.S.C. §§ 2014(hh) & 2210.

Believing tribal jurisdiction to be precluded by federal law, El Paso filed a complaint for declaratory and injunctive relief in the United States District Court for the District of Arizona. (App. 11a-17a) El Paso's complaint, and a subsequent motion for a preliminary injunction, recited that El Paso's mines had operated under AEC contract and supervision and that the Price-Anderson Amendments Act established the exclusive remedy for the Neztsosies' personal injury claims. Thus, El Paso argued, the Neztsosies' tribal law claims were preempted by federal law and the tribal court lacked subject matter jurisdiction.

The district court (Hon. Roger G. Strand) granted in part and denied in part El Paso's motion for an injunction. The court acknowledged that "the United States has a very strong and compelling interest to assure that it operates its nuclear industry in all of its varying facets in a manner that is uniformly appropriate for all," but stated that the presence of tribal governments within the United States "compounds this problem" and results in a "mix of complexity." (App. 69a-70a) The district court decided to resolve this "complexity" by allowing the tribal court to hear the Neztsosies' claims based on tribal law while enjoining the Neztsosies from asserting in tribal court any claims under Price-Anderson. The court declined to decide whether the tribal law claims had been preempted by Price-Anderson. (App. 71a)

Subsequently, in tribal court, the Navajo tribal judge denied El Paso's motion to dismiss the Neztsosies' complaint

on the basis of federal preemption. Characterizing El Paso's preemption defense as a "bootstrap argument," the tribal court observed that "Plaintiff's complaint cites Navajo common law, and not the [Price-Anderson] Act, as its authority."[3] The tribal court thus concluded that "the Price-Anderson Act has no application to this case" (*id.* at 13) and that the Neztsosies' claims could proceed.

B. *Cyprus v. Richards* -- Tribal and Federal District Court Proceedings

The suit involving Cyprus Foote Mineral Company and Cyprus Amax Minerals Company (collectively "Cyprus") is similar in nature to the El Paso suit. Cyprus is successor to a company that, in the late 1950s and early 1960s, conducted federally-regulated and -licensed uranium mining and milling operations on the Navajo reservation. Zonnie Richards, a member of the Navajo Nation, sued Cyprus in tribal court, individually and as representative of her husband's estate, alleging wrongful death and personal injuries as a result of radioactive contamination from tailings and wastes from mine and mill sites of Cyprus and others. Ms. Richards' claims were based entirely upon tribal law, including negligence, strict liability for "ultra hazardous" activities, and "outrageous conduct." (App. 39a-60a) Exemplary as well as compensatory damages were sought. Price-Anderson was not mentioned in Ms. Richards' complaint, and the tribal court denied Cyprus' motion to dismiss the complaint on the basis of Price-Anderson preemption. (App. 61a-67a)

Cyprus then counter-sued in Arizona federal court, and the result was another partial injunction by District Judge Strand, similar to the El Paso partial injunction -- *i.e.*, Ms. Richards was permitted to prosecute her tribal law claims in

[3]Order Denying Defendant's Motions To Dismiss, No. TC-CV-0052-95, at 4 (D.C. Navajo Nation Judicial District of Tuba City, Arizona, Oct. 9, 1996). Copies of this opinion, and other selective excerpts from the tribal court proceedings, will be lodged with the Clerk.

tribal court, but was enjoined against pursuing any Price-Anderson claims in that forum. (App. 72a-73a)

C. The Court of Appeals

El Paso and Cyprus filed appeals, which were consolidated, to the United States Court of Appeals for the Ninth Circuit, seeking review of the district court orders refusing to enjoin prosecution of the tribal claims in Navajo tribal court. Importantly, neither the Neztsosies nor Ms. Richards cross-appealed the district court's injunctions that precluded them from initiating any Price-Anderson claims in tribal court.

A divided panel of the Ninth Circuit affirmed the district court's refusal to enjoin prosecution of tribal law claims and, *sua sponte*, reversed the injunctions against the assertion of Price-Anderson claims in tribal court. The panel majority (Judges Pregerson and Ferguson) concluded that, under *National Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845 (1985), and *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9 (1987), a non-Indian sued in tribal court must exhaust tribal remedies before seeking relief in federal court, save in very narrow circumstances. (App. 78a-81a) Quoting *National Farmers*, the court stated that the decisive issue was whether the Price-Anderson Amendments Act contained an "express jurisdictional prohibition" of tribal adjudication of nuclear-related claims. (App. 85a) Without directly challenging the holdings of other Circuits that Price-Anderson provides an exclusive federal *remedy* for nuclear-related torts, the court concluded that it need not reach the preemption issue because the Act did not expressly provide for exclusive federal court *jurisdiction*. (App. 86a) This Court's recent decision in *Strate v. A-1 Contractors*, 520 U.S. 438 (1997), which held that tribal exhaustion was not required with respect to matters over which a tribe plainly lacks regulatory jurisdiction (*id.* at 453 & 459-60 n.14), was distinguished in a footnote as limited to torts arising on reservation lands that had been transferred to state control and opened to the public. (App. 87a-88a n.5)

As for the district court's injunctions against assertion of Price-Anderson claims in tribal court, the Ninth Circuit majority acknowledged that the Neztsosies and Ms. Richards had not appealed those orders and were asserting only claims "based on Navajo common law and . . . not implicat[ing] Price-Anderson." (App. 81a) Nonetheless, the court of appeals *sua sponte* reversed the injunctions, citing "important comity considerations" and its view that Price-Anderson contained no express prohibition of tribal jurisdiction. (App. 82a)

Judge Kleinfeld dissented. He recited the holdings of other Circuits that the Price-Anderson Amendments Act provides an exclusive federal law remedy and preempts all other causes of action for nuclear-related torts. (App. 94a-95a, citing *In re TMI Litig. Cases Consol. II,* 940 F.2d 832, 854 (3d Cir. 1991) ("A claim growing out of any nuclear incident is compensable under the terms of the [Price-Anderson] Act or *it is not compensable at all.*" (emphasis in original)), and *O'Conner v. Commonwealth Edison Co.,* 13 F.3d 1090, 1099 (7th Cir. 1994) (same)). Judge Kleinfeld thus concluded that the tribal members' "claims for injury and death resulting from nuclear materials left over from uranium mining were Price-Anderson claims or nothing." (App. 94a)

It followed, Judge Kleinfeld reasoned, that the tribal court lacked jurisdiction over the tribal members' claims and that exhaustion was not required. Because the tribal members were limited to Price-Anderson remedies, had failed to appeal the district court's rulings that Price-Anderson claims could not be asserted in tribal court, and were asserting in tribal court only claims that had been preempted by federal law, "there are no claims that can be made in tribal court. There can be no claim for which exhaustion in tribal court can be required." (App. 95a)

SUMMARY OF ARGUMENT

I. In the Atomic Energy Act of 1954, Congress found that the development and control of nuclear materials were "vital to the common defense" and that federal regulation of such materials would promote the "national interest." 42 U.S.C. § 2012(a) & (c). Accordingly, Congress established an extensive program administered by the Atomic Energy Commission to regulate private-sector participation in the nuclear industry. Moreover, to supplement the AEC's licensing and regulatory controls, the Price-Anderson Amendments Act of 1988 added an additional feature to the AEA: an exclusive federal law remedial framework to govern all claims of injury alleged to be caused by nuclear-related activities in the United States.

Tribal law claims cannot survive this exclusive federal regime. Four Circuits have held without dissent that Congress intended the Price-Anderson regime to be the sole means by which nuclear-related torts may be adjudicated in the United States, and therefore that the Act preempts state law claims. For the same reason, tribal claims for nuclear-related torts are preempted. The statutory language declaring that all claims for nuclear torts must be Price-Anderson claims is unqualified, and the policy reasons that underlie that legislative decision are even more applicable to tribal claims than to state claims.

II. In light of the preemptive effect of Price-Anderson, requiring petitioners to exhaust tribal remedies makes no sense. The Ninth Circuit, in ruling to the contrary, gave no weight to the federal policy objectives of Price-Anderson, and failed to follow the teachings of *Strate v. A-1 Contractors*, 520 U.S. 438 (1997). Under *Strate*, a tribal court has no adjudicatory jurisdiction over matters that are beyond the tribe's regulatory jurisdiction. Indian tribes have no authority to regulate nuclear safety issues, because the federal government has exclusive jurisdiction of that subject under the Atomic Energy Act. On top of this, tribal tort law as applied to nuclear torts has now been preempted by Price-Anderson.

Accordingly, an exhaustion requirement in the present context would "serve no purpose other than delay." *Strate*, 520 U.S. at 459 n.14. Subjecting non-Indians to lengthy and futile tribal court proceedings for alleged nuclear torts undermines Price-Anderson's exclusive federal law remedy, is contrary to the prudential considerations that underlie this Court's exhaustion decisions, and would needlessly waste the resources of Indian claimants, the tribal court, and non-Indian litigants alike.

III. The Ninth Circuit also erred in reversing, *sua sponte*, the district court's orders that Price-Anderson claims should not be adjudicated in tribal courts. Because no appeal or cross-appeal had been taken from those orders, the court of appeals lacked jurisdiction to overrule them. In any event, the district court's orders were entirely correct. Price-Anderson's detailed federal regime for the uniform and equitable treatment of nuclear torts would be frustrated by tribal court adjudications.

ARGUMENT

I. Because the Atomic Energy Act and Price-Anderson Acts Provide the Exclusive Governing Law for Nuclear-Related Activities and Torts in the United States, Respondents' Tribal Law Claims Are Preempted.

The history of the Atomic Energy Act of 1954, including amendments from the Price-Anderson Act and Price-Anderson Amendments Act, shows one thing beyond doubt: Congress intended that federal law alone should govern health and safety issues relating to nuclear activities in the United States. More specifically, Congress ultimately concluded that federal law should provide the exclusive remedy for nuclear-related torts. Claims such as those of the Neztsosies and Ms. Richards are cognizable only under federal law, and claims based on any other body of law -- including tribal law -- are preempted.

A. The Atomic Energy Act of 1954

Comprehensive federal control over nuclear-related activities began with the Atomic Energy Act of 1946, ch. 724, 60 Stat. 755 (1946). At that time, Congress "contemplated that the development of nuclear power would be a Government monopoly." *Duke Power Co. v. Carolina Envtl. Study Group*, 438 U.S. 59, 63 (1978). Within just a few years, however, Congress modified its approach and sought to encourage private-sector participation. Congress concluded that "the national interest would be best served if the Government encouraged the private sector to become involved in the development of atomic energy for peaceful purposes under a program of federal regulation and licensing."[4]

---

[4] *Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Devel. Comm'n*, 461 U.S. 190, 207 (1983), *citing* H.R. Rep. No. 83-2181, at 1-11 (1954).

The Atomic Energy Act of 1954 (AEA)[5] implemented that new policy. Congress found that the "development, utilization, and control of atomic energy" for both military and civilian purposes "are vital to the common defense and security." 42 U.S.C. § 2012(a). Private industry should play a role in that development, but private activities must be "regulated in the national interest" (*id.* § 2012(c) & (d)) and, indeed, "regulated *by the United States* . . . to assure the common defense and security and to protect the health and safety of the public." *Id.* § 2012(e) (emphasis added). The AEA thus launched a comprehensive licensing and regulatory program, administered by the Atomic Energy Commission, to govern private conduct in the nuclear field, including the possession, transfer, and processing of source material, byproduct material, and special nuclear material. 42 U.S.C. §§ 2014(c), (e), (z), (aa), 2061-2064, 2071-2078, 2091-2099, 2111-2114; *see* 10 C.F.R. ch. 1.[6]

Given the pervasive nature of AEA regulation and its close relationship to matters of national defense, this Court has consistently recognized that the federal government has "*exclusive* jurisdiction to license the transfer, delivery, receipt, acquisition, possession, and use of nuclear materials." *Pacific Gas & Elec.*, 461 U.S. at 207 (emphasis added). *See also*

[5]Ch. 1073, 68 Stat. 919 (1954), *codified as amended at* 42 U.S.C. §§ 2011-2297g-4.

[6]Uranium mining and milling involve both "source material," which includes uranium and uranium ore over certain minimum concentration levels (42 U.S.C. § 2014(z)), and "byproduct material," which includes tailings and wastes arising from the extraction or concentration of uranium ore processed for its source material content (*id.* § 2014(e)). Respondents' tribal court complaints also allege that petitioners' operations released plutonium, a "special nuclear material" under the AEA. *Id.* § 2014(aa).

By virtue of the Energy Reorganization Act of 1974, 42 U.S.C. §§ 5801 *et seq.*, the Nuclear Regulatory Commission and U.S. Department of Energy have now assumed the powers of the AEC under the Atomic Energy Act. *See Duke Power*, 438 U.S. at 63 n.1.

Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 248 (1984) (the federal government has "*exclusive* regulatory authority over the safety aspects of nuclear power") (emphasis added). State regulation of the field was preempted: "Upon these subjects [health and safety regulation of nuclear-related activities], no role was left for the States." *Pacific Gas & Elec.*, 461 U.S. at 207.[7]

B. The Price-Anderson Act

One area where the states' role was initially left unaffected by the AEA was tort law. The AEA did not address that issue directly, and no federal remedy for nuclear torts was provided as an alternative to state or other non-federal law. This omission almost immediately became a subject of concern. During 1956 and 1957 hearings of the Joint Committee on Atomic Energy, private-sector representatives expressed their reluctance to enter the nuclear field because of the risks of large tort liability in the event of a major nuclear accident.[8] After assessing this testimony, the Joint Committee concluded that, despite the 1954 Act's objective to "encourage the entrance of private industry into the program, and [to] speed the further development of the peaceful uses of atomic energy, . . . the problem of liability

[7]As *Pacific Gas & Electric* indicated, however, AEA preemption did not extend to every aspect of state law affecting the nuclear industry. In *PG&E*, the Court upheld California's authority to regulate, as an economic matter, the decision whether a utility should build a nuclear plant. While "the Federal Government maintains complete control of the safety and 'nuclear' aspects of energy generation," the AEA expressly confirmed the states' traditional regulatory rule with respect to utility economic issues. 461 U.S. at 208-12, *citing* 42 U.S.C. §§ 2018 & 2021.

[8]*See Hearings before the Joint Committee on Atomic Energy on Governmental Indemnity for Private Licensees and AEC Contractors Against Reactor Hazards*, 84th Cong., 2d Sess. (1956); *Hearings before the Joint Committee on Atomic Energy on Governmental Indemnity and Reactor Safety*, 85th Cong., 1st Sess. (1957).

has become a major roadblock."[9]

Congress took its first step to address this liability issue in the Price-Anderson Act of 1957.[10] "The Act had the dual purpose of 'protect[ing] the public and . . . encourag[ing] the development of the atomic energy industry.'" *Duke Power*, 438 U.S. at 64 (*quoting* 42 U.S.C. § 2012(i)). Amending the AEA, the statute established an AEC-supervised program of financial protection that both ensured the availability of funds for tort victims in the event of a nuclear accident, and also protected companies in the nuclear field against large-scale liability risks.[11] The statute mandated that the AEC apply this program to all its licensees engaged in the construction or operation of nuclear power plants; application of the program to the other AEC-regulated functions was left to agency determination.[12]

---

[9]S. Rep. No. 85-296, at 1 (1957); H.R. Rep. No. 85-435, at 1 (1957). *See also Duke Power*, 438 U.S. at 64 ("spokesmen for the private sector informed Congress that they would be forced to withdraw from the field if their liability were not limited by appropriate legislation").

[10]Pub. L. No. 85-256, 71 Stat. 576 (1957), *codified as amended in, e.g.*, 42 U.S.C. §§ 2012(i), 2014(j)-(u) & 2210.

[11]Price-Anderson Act § 4, AEA § 170(a) & (d), *as amended*, 42 U.S.C. § 2210(a) & (d). The program consisted of (i) financial responsibility requirements for AEC licensees (mandatory private insurance or its equivalent), (ii) limitations on total damages, and (iii) governmental indemnification of damages in excess of insurance coverage.

[12]AEA § 170(d), 42 U.S.C. § 2210(d).

Price-Anderson financial protections are not limited, however, to parties who have indemnity agreements with the government. The phrase "person indemnified" under the Act is defined as "the person with whom an indemnity agreement is executed *and any other person who may be liable for public liability* [*i.e.*, for a nuclear-related tort]." Price-Anderson § 3, 71 Stat. 576, *as amended*, 42 U.S.C. § 2014(t). As one committee report explained:

(continued...)

While mitigating the risks of liability exposure, these initial Price-Anderson provisions did not alter the fact that non-federal law would be the underlying source of liability for nuclear torts. Indeed, "the right of the State courts to establish the liability of the persons involved in the normal way is maintained." S. Rep. No. 85-296, at 22. However, federal courts were authorized to enter supervisory orders that could affect actions pending in state courts, such as by declaring total liability for a nuclear accident to be limited, staying the payment of judgments, and apportioning payments among claimants. Price-Anderson § 4, 71 Stat. 578, *as amended*, 42 U.S.C. § 2210(o). Thus, a mixture of state law rights with an overlay of federal law protections and oversight was adopted. *See Duke Power*, 438 U.S. at 64-65, 82-94 (summarizing Price-Anderson provisions and upholding their constitutionality).

Prior to the major overhaul in 1988 that is the focus of the preemption issues presented here (*see* section C below), Congress fine-tuned the Price-Anderson Act on several occasions.[13] Amendments adopted in 1966, for example,

---

[12](...continued)

> "Price-Anderson indemnity coverage has, from its inception, extended to any person who may be liable for public liability. This coverage was intentionally broad since the primary purpose of the legislation was to protect the public. As such, there is no reason to restrict coverage to those situations in which contractors or licensees of the [AEC] were the parties determined to be liable."

S. Rep. No. 87-1677, at 9 (1962) (report accompanying 1962 amendments to Price-Anderson Act). *See also* S. Rep. No. 85-296, at 17 (1957) (indemnities extend to all persons found liable for a nuclear tort). Given the status of the instant litigation, there has been no adjudication whether petitioners would have indemnification rights under Price-Anderson in the present circumstances.

[13]Pub. L. No. 87-615, 76 Stat. 409 (1962); Pub. L. No. 89-210, 79 Stat. 855 (1965); Pub. L. No. 89-645, 80 Stat. 891 (1966); Pub. L. No. 94-197, 89 Stat. 111 (1975).

required indemnified AEC licensees to waive certain state law tort defenses in the event of an "extraordinary nuclear occurrence,"[14] and provided for an absolute right of removal from state to federal court of suits arising from such occurrences.[15] Those amendments reflected a growing congressional concern that "state tort law dealing with liability for nuclear incidents was generally unsettled and that some way of insuring a common standard of responsibility for all jurisdictions . . . was needed." *Duke Power*, 438 U.S. at 65.[16]

---

[14]Pub. L. No. 89-645, § 3, 80 Stat. 891-92, 42 U.S.C. § 2210(n)(1). An "extraordinary nuclear occurrence" was defined as an event causing the discharge or dispersal of nuclear material in amounts that the AEC determined were "substantial" and likely to result in "substantial damages." *Id.* § 1, *as amended at* 42 U.S.C. § 2014(j).

[15]*Id.*, 80 Stat. 892, 42 U.S.C. § 2210(o) & (n)(1). *See* S. Rep. No. 89-1605, at 15 (1966):

> "The absolute right of removal is important because it provides a mechanism for bringing before the same court all cases arising from the same set of circumstances -- circumstance with which the court would become thoroughly familiar. Claimants and defendants would become acquainted with the approach taken by the court, the taking of depositions, and other evidentiary problems would be simplified, and this would seem to be a deterrent to an excess number of cases actually going to trial. The end result, it is believed, would be more expeditious and uniform treatment of all parties."

As discussed at pp. 18-19 *infra*, Congress later extended this absolute right of removal to all nuclear-related tort claims.

[16]*See also id.* at 89:

> "The legislative history of the liability-limitation provisions and the accompanying compensation mechanism [of the initial Price-Anderson Act and its early amendments] reflects Congress' determination that reliance on state tort law remedies and state-court procedures was an unsatisfactory approach to

(continued...)

Nonetheless, at least for the time being, state law continued to govern nuclear torts, notwithstanding potential conflicts between state tort rules and federal safety standards. This Court thus concluded in *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1984), that the Price-Anderson Act did not preempt state law claims for punitive damages arising from a nuclear accident. Although there was some "tension" between state tort rules and federal regulation of safety standards, Congress was seen to have made an election against tort law preemption:

> "In sum, it is clear that in enacting and amending the Price-Anderson Act, Congress assumed that state-law remedies, in whatever form they might take, were available to those injured by nuclear incidents. This was so even though it was well aware of the NRC's exclusive authority to regulate safety matters. No doubt there is tension between the conclusion that safety regulation is the exclusive concern of the federal law and the conclusion that a State may nevertheless award damages based on its own law of liability. But as we understand what was done over the years in the legislation concerning nuclear energy, Congress intended to stand by both concepts and to tolerate whatever tension there was between them. We can do no less." *Id.* at 256.[17]

---

[16](...continued)
assuring public compensation for nuclear accidents, while at the same time providing the necessary incentives for private development of nuclear-produced energy."

[17]Justice Powell dissented in *Silkwood*, in an opinion joined by Chief Justice Burger and Justices Marshall and Blackmun:

> "Striking the balance between the need to promote nuclear development and the responsibility to insure public safety is a task that requires a unique level of professional expertise.

(continued...)

C. The Price-Anderson Amendments Act of 1988

The deference to state law fundamentally changed with the Price-Anderson Amendments Act of 1988.[18] In addition to concern over the *Silkwood* ruling, Congress had seen the aftermath of the Three Mile Island (TMI) nuclear incident in 1979. That incident resulted in over 150 separate lawsuits in various state and federal courts, with more than 3,000 claimants and multiple defendants. Yet, because the NRC had determined that TMI was not an "extraordinary nuclear occurrence" under the terms of Price-Anderson's 1966 amendments, the suits proceeded in multiple courts without consolidation or coordination. *See* S. Rep. No. 100-218, at 13 (1987); *Kiick v. Metropolitan Edison Co.*, 784 F.2d 490 (3d Cir. 1986) (federal courts lacked subject matter jurisdiction over TMI claims because of the absence of an "extraordinary nuclear occurrence"). Attorneys representing both plaintiffs and defendants testified to Congress about the inefficiencies and potential inequities of such a system. *See* S. Rep. No. 100-218, at 13.

Accordingly, Congress concluded that Price-Anderson needed to be "substantially modified in a manner that will better achieve the goal of providing in advance of any nuclear

---

[17](...continued)
Congress has enacted detailed legislation and created a highly qualified administrative agency to promulgate and enforce regulations. Those regulations constitute a uniform body of law carefully designed to balance safety and efficiency in nuclear facilities across the country."

464 U.S. at 282. Thus, in the dissenters' view, state law allowance of punitive damages was preempted. The effectiveness of AEA regulation was seen to "require[] that nuclear policy and regulation be insulated from ad hoc, uninformed and perhaps biased decisionmaking." *Id.*

[18]Pub. L. No. 100-408, 102 Stat. 1066 (1988). "With the Amendments Act . . ., the entire Price-Anderson landscape was transformed." *In re TMI Litig. Cases Consol. II*, 940 F.2d 832, 857 (3d Cir. 1991).

incident a mechanism for full compensation of the public that is equitable, efficient, reliable, and comprehensive." S. Rep. No. 100-218, at 4 (1987). In the words of the House Report, there was a need for "equitable and uniform treatment of victims of a nuclear accident." H.R. Rep. No. 100-104, pt. 1, at 18 (1987). The 1988 Amendments Act sought to achieve that result, as follows:

First, the 1988 Amendments federalized the law of nuclear torts by "creat[ing] a federal cause of action which did not exist prior to the Act." *In re TMI Litig. Cases Consol. II*, 940 F.2d 832, 856 (3d Cir. 1991). This new cause of action was called a "public liability action" and was defined to mean "any suit asserting public liability."[19] The term "public liability," incorporated from the original 1957 Price-Anderson Act, was defined as "*any legal liability* arising out of or resulting from a nuclear incident." 42 U.S.C. § 2014(w) (emphasis added). In turn, "nuclear incident," also dating from the 1957 Act, was defined broadly to include

> "*any occurrence* . . . within the United States *causing*, within or outside the United States, *bodily injury*, sickness, disease, or death, or loss of or damage to property, or loss of use of property, arising out of or *resulting from* the radioactive, toxic, explosive, or other hazardous properties of *source*, special nuclear, or *byproduct material* . . . ."

Id. § 2014(q) (emphasis added).[20]

Without doubt, the "public liability action" created by the 1988 Amendments is a *federal* cause of action, arising under

---

[19]1988 Amendments Act § 11(b), 102 Stat. 1076, *codified at* 42 U.S.C. § 2014(hh).

[20]*See* S. Rep. No. 85-296, at 17 ("The definition of 'nuclear incident' is designed to protect the public against any form of damage arising from the special dangerous properties of the materials used in the atomic energy program.").

the Price-Anderson Act as then amended. The statute was explicit on this point: "A public liability action *shall be deemed to be an action arising under section 2210 of this title* [the Price-Anderson Act] . . . ."[21] Further, the United States district court in the district where a nuclear incident occurred was given original jurisdiction over any public liability action that arose, without regard to the citizenship of parties or the amount in controversy.[22] In the words of the House Report, the Act "expressly states that any suit asserting public liability shall be deemed to be an action arising under the Price-Anderson Act, thereby making such suits asserting public liability 'Cases . . . arising under . . . the Laws of the United States' within the meaning of Article III." H. R. Rep. No. 100-104, pt. 1, at 18.[23]

Second, to further assure the availability of a federal forum, Congress eliminated the bifurcated approach of the 1966 amendments, which had allowed for removal from state to federal court only of tort claims arising from an "extraordinary nuclear occurrence."[24] As experience from Three Mile Island had shown, "[t]he need for consolidation of

---

[21]1988 Amendments Act § 11(b), 102 Stat. 1076, 42 U.S.C. § 2014(hh) (emphasis added).

[22]1988 Amendments Act § 11(a), 102 Stat. 1076, *amending* 42 U.S.C. § 2210(n)(2). Prior to this amendment, § 2210(n)(2) provided a basis for federal jurisdiction only for suits that involved an "extraordinary nuclear occurrence," which in turn would typically involve Price-Anderson's financial protection program.

[23]*See O'Connor v. Commonwealth Edison Co.*, 13 F.3d 1090, 1100 (7th Cir. 1994) (Congress had a "manifest intent to create a new and entirely federal cause of action"); *In re TMI Cases*, 940 F.2d at 851-60 (by virtue of the 1988 Amendments Act, public liability claims are federal causes of action and thus properly within the federal courts' Article III jurisdiction of claims based on federal law).

[24]1988 Amendments Act § 11(a), 102 Stat. 1076, *amending* 42 U.S.C. § 2210(n)(2).

claims to ensure equitable and uniform treatment of victims and the orderly distribution of funds is just as great whether the claims arise from a nuclear incident that ultimately is deemed not to be an extraordinary nuclear occurrence or from an incident that is." H.R. Rep. No. 100-104, pt. 1, at 18. Thus, any public liability action filed in state court is now automatically removed to federal court at the defendant's request, or at the request of the NRC or Department of Energy.[25] This guarantees, *inter alia*, the effectiveness of Price-Anderson provisions designed to ensure that related nuclear claims can be addressed in a uniform and coordinated fashion and ensures that federal court jurisdiction may extend to the federal law cause of action prescribed by the Amendments.[26]

Third, Congress returned to the issue of punitive damages. The 1988 Amendments partially overturned the *Silkwood* decision by precluding an award of punitive damages against any person with an indemnification agreement with the United States.[27] Congress explained that this action "reflects the longstanding policy that the Federal government should not be liable for punitive damages." S. Rep. No. 100-218, at 12.

* * * *

---

[25]42 U.S.C. § 2210(n)(2).

[26]*See, e.g.*, 42 U.S.C. § 2210(n)(3)(A) (chief judge of U.S. district court hearing nuclear-related claims may appoint a special caseload management panel to coordinate cases); *id.* § 2210(n)(3)(C) (panel may consolidate related claims for trial, appoint special masters to hear elements of the cases, adopt special rules to allow for more equitable consideration of claims, and implement such other measures "as will encourage the equitable, prompt, and efficient resolution of cases arising out of the nuclear incident").

[27]§ 14, 102 Stat. 1078, *codified at* 42 U.S.C. § 2210(s). *See* S. Rep. No. 100-218, at 12.

The Price-Anderson Amendments Act thus advanced the original dual goals of the 1954 AEA and the 1957 Price-Anderson Act to protect public safety and to ensure private-sector participation in the nuclear industry by limiting unreasonable and unpredictable legal risks.[28] A federal cause of action was created for nuclear torts, subject to federal court jurisdiction and to the various financial and procedural safeguards of Price-Anderson and its progeny. As we now show, permitting tribal law claims for nuclear torts would be inconsistent with both the letter and intent of Price-Anderson as overhauled by Congress in 1988.

D. Preemption Under the Amendments Act

Price-Anderson as amended in 1988 established a federal law "public liability action" that Congress defined as "*any* suit asserting public liability." 42 U.S.C. § 2014(hh). "[P]ublic liability" meant "*any* legal liability arising out of or resulting from a nuclear incident." *Id.* § 2014(w). Congress defined a "nuclear incident" as "*any* occurrence" that caused injuries or death from nuclear materials. *Id.* § 2014(q).[29] The new action was to apply to all nuclear incidents, whether "occurring before, on, or after the date of the enactment of [the 1988 Amendments]."[30] Clearly, Congress purposely

[28]*See Pacific Gas & Elec.*, 461 U.S. at 207 (the AEA "grew out of Congress' determination that the national interest would be best served if the Government encouraged the private sector to become involved in the development of atomic energy for peaceful purposes under a program of federal regulation and licensing"); *Duke Power*, 438 U.S. at 64 (Price-Anderson Act of 1957 addressed concerns that private firms might refuse to operate nuclear-related facilities "if their liability were not limited by appropriate legislation").

[29]Emphasis added in each instance.

[30]1988 Amendments Act § 20(b)(1), 102 Stat. 1084.

chose this language to be sweepingly inclusive.[31]

Not surprisingly, every court of appeals that has addressed the issue has held that Price-Anderson as now amended establishes an exclusive federal remedy for nuclear-related torts, preempting any other theories of liability. *See In re TMI Litig. Case Consol. II*, 940 F.2d 832, 854 (3d Cir. 1991) ("A claim growing out of any nuclear incident is compensable under the terms of the Amendments Act or *it is not compensable at all*"; state law claims preempted (emphasis in original)); *Nieman v. NLO, Inc.*, 108 F.3d 1546, 1553 (6th Cir. 1997) ("Nieman can sue under the Price-Anderson Act, as amended, or not at all"; state law claims preempted); *O'Conner v. Commonwealth Edison Co.*, 13 F.3d 1090, 1105 (7th Cir. 1994) ("state regulation of nuclear safety, through either legislation or negligence actions, is preempted by federal law"); *Roberts v. Florida Power & Light Co.*, 146 F.3d 1305 (11th Cir. 1998) (endorsing *TMI*, *Nieman*, and *O'Connor* and holding state law claims to be preempted), *petition for cert. filed* (U.S. Oct. 17, 1998) (No. 98-640). Each of these cases held that federal standards defined the duty of care by which a defendant's conduct should be judged in a public liability action; any differing state tort or regulatory standard was preempted.[32]

[31]*See* S. Rep. No. 100-218, at 13 ("Any suit asserting public liability shall be deemed to be an action arising under the Price-Anderson Act"); H.R. Rep. No. 100-104, pt. 1, at 18 (the act "expressly states that any suit asserting public liability shall be deemed to be an action under the Price-Anderson Act").

[32]The Tenth Circuit, in the only case other than the present one to address whether Price-Anderson preempts tribal law claims, likewise found preemption. *See Kerr-McGee Corp. v. Farley*, 115 F.3d 1498, 1504 (10th Cir. 1997), *cert. denied*, 118 S. Ct. 880 (1998) ("The PAA [Price-Anderson Act] on its face provides the sole remedy for the torts alleged in this case [claims under tribal law]."). Inexplicably, though, *Farley* required exhaustion of the preempted tribal remedies. In that respect, the Tenth Circuit committed the same error as the Ninth Circuit below.

These decisions are clearly correct, because Price-Anderson forecloses all claims for nuclear liability not expressly sanctioned by the Act. Indeed, the case for preemption of tribal claims is even stronger than for state law claims. This is because the 1988 Price-Anderson Amendments, while establishing an exclusive federal cause of action, provide that "the substantive rules for decision in [a public liability] action *shall be derived from the law of the State* in which the nuclear incident involved occurs, unless such law is inconsistent with the provisions of [Price-Anderson]." 42 U.S.C. § 2014(hh) (emphasis added). This limited borrowing of state law does not undermine the federal nature of a Price-Anderson public liability action, and the lower courts have consistently so held.[33] But, the fact that state law is borrowed for some purposes, with no provision for application of tribal law, unambiguously refutes the argument that there is any role for tribal law in the field of nuclear torts.[34]

Moreover, tribal law claims -- particularly if litigated in tribal courts -- raise all the same problems that existed under state law regimes prior to Price-Anderson, and more: broad and unpredictable standards of care,[35] the inability to

---

[33]*See, e.g., In re TMI Cases*, 940 F.2d at 855 ("state law provides the content of and operates *as federal law*"; thus, the actions are federal law in nature) (emphasis added); *O'Connor*, 13 F.3d at 1100; *Roberts v. FPL*, 146 F.3d 1305. *See also* pp. 17-18 *supra*.

[34]Price-Anderson's borrowing "from the law of the *State*" in which the nuclear incident occurs (42 U.S.C. § 2014(hh); emphasis added) cannot reasonably be read as a reference to tribal law, and respondents have never argued that it can.

[35]For example, respondents' tribal court complaints both contain a count for "outrageous conduct," wherein they allege that petitioners' conduct was

> "so outrageous in character and so extreme in degree as to compel a reasonable person in the Navajo community to declare

(continued...)

consolidate and coordinate related actions,[36] the absence of procedures to include the United States as a party,[37] the absence of financial-protection provisions for large nuclear

---

[35](...continued)

> the same as atrocious, beyond all bounds of decency, and utterly intolerable in a civilized Navajo community."

(App. 25a & 57a) If permissible, this claim would obviously give broad discretion to a Navajo jury to apply unique local rules in deciding petitioners' liability. In a "public liability action" under Price-Anderson, by contrast, federal regulatory standards set the relevant standard of care. *In re TMI Cases*, 940 F.2d at 859; *O'Connor*, 13 F.3d at 1103-05; *Roberts v. FPL*, 146 F.3d at 1308.

[36]For example, the preservation of tribal claims in tribal courts would serve to deny the many procedural innovations intended by Congress: federal removal rights at the option of any party (42 U.S.C. § 2210(n)(2)), a caseload management panel appointed by the federal court (*id.* § 2210(n)(3)), and the ability of the NRC or Department of Energy to require consolidation of related claims (§ 2210(n)(2)).

[37]The sovereign immunity of the United States forecloses its being sued in tribal court (*e.g., United States v. Yakima Tribal Court*, 806 F.2d 853 (9th Cir. 1986)), and the United States has consistently refused to waive that immunity and to appear voluntarily in tribal litigation. For example, in the pending tribal court proceeding against Cyprus, Cyprus had sought to interplead the United States as a third-party defendant, noting that all the mining and milling operations had been conducted under AEC contracts for the benefit and under the supervision of the United States. Upon notice from the United States that it would not appear in tribal court, the third-party complaint was not allowed, and Cyprus' motion to dismiss for absence of a necessary party was denied. *See* Order Denying Motion To Dismiss, No. KY-CV-002-95 (D.C. Navajo Nation Judicial District of Kayenta, Arizona, May 20, 1997).

Price-Anderson contemplates that the United States can "take charge" of a public liability action in which it is likely to face an indemnity obligation, by appearing in the suit and by settling or defending the claims on its own initiative. 42 U.S.C. § 2210(h). How such a provision could operate in the context of tribal court litigation is wholly untested.

accidents,[38] and -- to quote Justice Powell on the adjudication of nuclear torts under state law systems -- the risk of "ad hoc, uninformed and perhaps biased decision-making."[39] Additionally, the availability of federal constitutional protections in tribal court, such as due process limitations on punitive damage awards, is unclear.[40] Thus, the litigation of nuclear torts as tribal claims and in tribal courts is at odds with both the language and objectives of Price-Anderson.

The application of Price-Anderson to foreclose respondents' tribal law claims does not intrude on any protected tribal rights to self-governance. As the Court said in *South Dakota v. Bourland*:

> "Although Indian tribes retain inherent authority to

[38]*See, e.g.*, 42 U.S.C. § 2210(a)-(e), (i), (o)-(s).

[39]*Silkwood v. Kerr-McGee*, 464 U.S. at 282 (dissenting). The Price-Anderson Amendments recognize that radiation tort cases are uncommonly complex and present unusually difficult issues of scientific and medical evidence. *See, e.g., In re Hanford Nuclear Reservation Litigation*, 1998 WL 775340 (E.D. Wash. Aug. 21, 1998) (762-page opinion dealing with radiation claims on summary judgment); *Allen v. United States*, 588 F. Supp. 247 (D. Utah 1984) (225-page opinion devoted largely to discussion of the biophysics involved in a radiation tort), *rev'd*, 816 F.2d 1417 (10th Cir. 1987). The gatekeeping role which a federal judge would apply under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), is thus vitally important.

[40]*See BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996). The Indian Civil Rights Act of 1968 (ICRA) specifies that an Indian tribe, in exercising its powers of self-governance, shall not deprive any person of liberty or property without due process of law. 25 U.S.C. § 1302(8). The mechanism to secure federal court enforcement of that statute is, however, in doubt. *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978) (except by writ of habeas corpus, ICRA does not authorize an original federal action against tribal governmental action alleged to violate ICRA protections). Moreover, the Navajo supreme court has concluded that ICRA is likely unconstitutional under *United States v. Lopez*, 514 U.S. 549 (1995), and has thus declined to apply it. *Rough Rock Community School v. Navajo Nation*, SC-CV-06-94 (1996).

> punish members who violate tribal law, to regulate tribal membership, and to conduct internal tribal relations, the 'exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation.'"

508 U.S. 679, 694-95 (1993), *quoting Montana v. United States*, 450 U.S. 544, 564 (1981) (citation omitted). In any event, Congress has plenary power to regulate commerce with the Indian tribes (U.S. Const. art. I, § 8, cl. 3), and "all aspects of Indian sovereignty are subject to defeasance by Congress."[41] Nor does preemption of tribal law require an explicit reference to tribes; "it is now well settled . . . that a general statute in terms applying to all persons includes Indians and their property interests." *Federal Power Comm'n v. Tuscarora Indian Nation*, 362 U.S. 99, 116 (1960).[42]

[41]*Escondido Mutual Water Co. v. La Jolla Band of Mission Indians*, 466 U.S. 765, 788 n.30 (1984). *See also, e.g., South Dakota v. Yankton Sioux Tribe*, 118 S. Ct. 789, 798 (1998) ("Congress possesses plenary power over Indian affairs, including the power to modify or eliminate tribal rights.").

[42]*See also Reich v. Mashantucket Sand & Gravel*, 95 F.3d 174, 179 (2d Cir. 1996) ("tribal power, even regarding exclusively internal conflicts, may be limited by treaty or federal statute, . . . including statutes that are silent as to Indians"); *Lazore v. C.I.R.*, 11 F.3d 1180, 1188 (3d Cir. 1993) (rejecting Indian's claim to tax exemption based on "the since-discredited rule that general acts do not apply to Indians in the absence of a clear Congressional intent to the contrary"); *Lumber Indus. Pension Fund v. Warm Springs Forest Prods. Indus.*, 939 F.2d 683 (9th Cir. 1991) (ERISA applies to tribal entities notwithstanding absence of explicit congressional directive); *U.S. Dep't of Labor v. OSHRC*, 935 F.2d 182 (9th Cir. 1991) (OSHA applies to tribal entities notwithstanding absence of explicit congressional directive); *Blue Legs v. Bureau of Indian Affairs*, 867 F.2d 1094, 1097-98 (8th Cir. 1989) (RCRA's provision that "[a]ny action" be brought in federal court precludes tribal court jurisdiction and obviates any exhaustion requirement).

Price-Anderson's inclusion of "*any* suit" for "*any* legal liability" arising from "*any* occurrence" of nuclear injury (42 U.S.C. § 2014(w), (q), (hh) (emphasis added)) is plainly sufficient to encompass tribal law claims for nuclear torts.

Accordingly, just as Price-Anderson has preempted state law with respect to nuclear-related torts, it has also preempted tribal law. Respondents' claims of injuries from radioactive or toxic properties of uranium ore and mill wastes and tailings are public liability actions under the terms of Price-Anderson, for they are personal injury claims arising from a "nuclear incident."[43] Respondents must therefore look to federal law, and not to state or tribal law, for relief.

II. The Doctrine of Exhaustion of Tribal Remedies Does Not Require the Wasteful Exhaustion of Preempted Tribal Law Claims.

Notwithstanding the compelling case for Price-Anderson preemption, the Ninth Circuit declined to address the issue, ruling instead that El Paso and Cyprus had to exhaust tribal remedies. This mechanical application of the tribal exhaustion doctrine disregards the important federal interests that caused Congress to adopt Price-Anderson and, indeed, paradoxically requires recourse to tribal claims and remedies that -- by virtue of federal law -- do not in fact exist. And, in making its rulings, the Ninth Circuit failed to follow this Court's most recent decision on the tribal exhaustion doctrine, *Strate v. A-1 Contractors*, 520 U.S. 438 (1997).

A. The Tribal Exhaustion Doctrine

The doctrine of tribal court exhaustion derives from *National Farmers Union Ins. Cos. v. Crow Tribe of Indians*,

[43]42 U.S.C. § 2014(q). It is well-understood that a "nuclear incident" may be either a sudden event, or may occur over a long period of time from exposure to radioactive material. *See* S. Rep. No. 85-296, at 16 (1957).

471 U.S. 845 (1985), and *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9 (1987). *National Farmers* involved a personal injury action filed in tribal court on behalf of a Crow Indian against a state-chartered school district. The school district and its insurer brought a federal court action to enjoin the tribal proceeding, and this Court concluded that the district court had jurisdiction under 28 U.S.C. § 1331 to hear the school district's claim that the tribal court was exceeding its jurisdiction as defined by federal Indian law. However, "[f]inding no cause for immediate federal-court intervention" (*Strate*, 520 U.S. at 449), the Court ordered that the federal district court should either stay its hand, or dismiss the federal action without prejudice, until the tribal court first had an opportunity to consider the question of its own jurisdiction. 471 U.S. at 852-53. The Court noted, however, that tribal exhaustion was not an inflexible requirement in all settings.[44]

Iowa Mutual also involved a personal injury action initially brought in tribal court. The claimants were tribal members, and the defendants included tribal members, a company owned by those members, and the defendants' insurer. The insurer then initiated a diversity action in federal court, claiming simply an absence of an obligation to defend. (No federal law challenge to tribal jurisdiction was asserted.) This Court held that diversity jurisdiction in the district court was proper, but once again the Court instructed the district court to consider staying its hand pending the exhaustion of tribal remedies. Citing the "analogous" federal/state absten-

[44]The Court provided three examples of situations where exhaustion should not be required:

> "where an assertion of tribal jurisdiction 'is motivated by a desire to harass or is conducted in bad faith,' or where the action is patently violative of express jurisdictional prohibitions, or where exhaustion would be futile because of the lack of an adequate opportunity to challenge the court's jurisdiction."

Id. at 856 n.21 (citation omitted). As *Strate* has made clear, this is not a complete list of exceptions to the exhaustion doctrine. *See* pp. 30-31 *infra*.

tion doctrine in *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976), the Court held that exhaustion of tribal remedies should be required where "strong federal policy concerns favored resolution in the nonfederal forum." 480 U.S. at 16 n.8. Stating that "[t]ribal authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty," the Court observed that "[c]ivil jurisdiction over such activities presumptively lies in the tribal courts unless affirmatively limited by a specific treaty provision or federal statute." *Id.* at 18.[45] "In the absence of any indication" that Congress intended to abrogate tribal jurisdiction over the reservation dispute in question (*id.*), exhaustion should be required.

National Farmers and *Iowa Mutual* both made clear that the tribal exhaustion doctrine was "prudential" rather than jurisdictional in nature (*Iowa Mutual*, 480 U.S. at 16 n.8 & 20 n.14) and was subject to exceptions (*National Farmers*, 471 U.S. at 856 n.21). Yet, some lower courts have imposed the doctrine in a mechanical and rigid fashion. For example, in *Crawford v. Genuine Parts Co.*, 947 F.2d 1405, 1408 (9th Cir. 1991), the Ninth Circuit held that "there is no discretion not to defer" to tribal court, even though the deferral request came on the eve of trial in federal court and years after the Native American plaintiffs in that case had themselves elected a non-tribal forum.

Likewise, in this case the Ninth Circuit focused almost exclusively on the phrase "patently violative of express jurisdictional prohibitions," one of the exceptions to the exhaustion doctrine identified in *National Farmers* (note 44 *supra*). Concluding that Price-Anderson contained no such "express jurisdictional prohibition," the court ordered exhaustion without considering whether Price-Anderson provided an express *substantive* bar to respondents' claims or

---

[45]In *Strate*, the Court explained that such presumptive tribal jurisdiction was limited to matters over which the tribe had regulatory authority. *See* p. 30 *infra*.

whether, in the context of nuclear torts, "strong federal policy concerns favored resolution in the *nonfederal* forum." *Iowa Mutual*, 480 U.S. at 16 n.8 (emphasis added). And, in ordering exhaustion, the court brushed aside arguments that deferring consideration of the threshold preemption issue would serve no useful purpose, would result in enormous expense and delay for both sides, and would frustrate Price-Anderson's objective of uniform and efficient federal-law treatment of nuclear torts.

B. The Teaching of *Strate*

In *Strate v. A-1 Contractors*, 520 U.S. 438 (1997), this Court clarified the law of tribal exhaustion in important respects, but its message went unheeded by the Ninth Circuit.

Strate involved a vehicular accident on a state highway traversing a federal Indian reservation. The state maintained and controlled the highway pursuant to a federal right-of-way grant. Complaining parties, some of whom were tribal members and some not, sued non-members in tribal court, and those defendants then counter-sued in federal court, claiming a lack of tribal jurisdiction by virtue of the right-of-way grant. In a unanimous opinion, this Court held that the tribal court lacked jurisdiction. The Court thus affirmed the court of appeals, which had reversed the district court's ruling that the tribal court had jurisdiction under *National Farmers* and *Iowa Mutual*. The Court held that, under the principles set forth in *Montana v. United States*, 450 U.S. 544 (1981), and other cases that define the limits of tribal authority over non-members, the tribe lacked regulatory jurisdiction within the state highway right-of-way, and as a result lacked adjudicatory jurisdiction over the non-member litigants.

Strate established three important principles:

First, the decision clarifies that the tribal court exhaustion doctrine of *National Farmers* and *Iowa Mutual* does not expand a tribe's jurisdiction over non-members beyond the limitations set forth in *Montana* and its progeny. That is, *Montana*'s "general proposition" that a tribe's inherent

sovereign powers "do not extend to the activities of non-members of the tribe" (450 U.S. at 565) is equally true for adjudicatory jurisdiction and regulatory jurisdiction. *National Farmers* and *Iowa Mutual* do not modify the *Montana* rules that limit tribal authority over non-members. *Strate*, 520 U.S. at 448.

Second, *Strate* unequivocally held that tribal court jurisdiction cannot exist where tribal regulatory jurisdiction is absent: "As to nonmembers, we hold, a tribe's adjudicative jurisdiction does not exceed its legislative jurisdiction." *Id.* at 453. The Court thus clarified the statement in *Iowa Mutual* that, with respect to "the activities of non-Indians on reservation lands," civil jurisdiction "presumptively lies in the tribal courts" (480 U.S. at 18). What was meant, *Strate* explained, was the "unremarkable" proposition that a tribe may have adjudicatory jurisdiction "where tribes possess *authority to regulate* the activities of non-members," which is sometimes (but certainly not always) the case with respect to on-reservation activities. *Strate*, 520 U.S. at 453 (emphasis added).

Third, *Strate* explained that tribal exhaustion was a principle "based on comity," "prudential" in nature, and "not an unyielding requirement." *Id.* at 449 n.7 & 453. Thus, exhaustion should not be blindly required where it will serve no useful purpose. *National Farmers* and *Iowa Mutual* noted that development of a full record in tribal court may be desirable not simply as an exercise of courtesy, but because the tribal court's findings of fact and conclusions on tribal law may inform the federal court on the issue of tribal jurisdiction.[46] In *Strate*, the Court recognized the other side of the same coin: that it may be clear at the outset that the tribe lacks jurisdiction and that its expertise on tribal law is of

[46]*See National Farmers*, 471 U.S. at 856-57 (exhaustion in the tribal courts will give federal courts "the benefit of their expertise"); *Iowa Mutual*, 480 U.S. at 16 ("tribal courts are best qualified to interpret and apply tribal law").

no moment, even in the absence of an "express jurisdictional prohibition" from Congress.

Thus, *Strate* concluded that, if it is "plain" that a tribe lacks jurisdiction to regulate a non-member's conduct, "it will be equally evident that tribal courts lack adjudicatory authority over disputes arising from such conduct." *Id.* at 459 n.14. "Therefore, when tribal-court jurisdiction over an action such as this one is challenged in federal court, *the otherwise applicable exhaustion requirement must give way, for it would serve no purpose other than delay*." *Id.* (internal citation omitted) (emphasis added). Indeed, requiring exhaustion when the tribe lacks adjudicatory authority would serve only to waste the parties' resources and to burden needlessly the tribal judicial system.[47]

C. The Application of *Strate* in the Context of Price-Anderson Claims

Under the analysis required by *Strate*, a critical threshold issue on the propriety of tribal court jurisdiction over a non-member is whether the tribe has regulatory jurisdiction with respect to the matters at issue. Where it is clear that

[47]This functional analysis is consistent with the approach to exhaustion applied in other contexts, where the lower courts are to balance the interests in prompt access to a judicial forum with countervailing interests that may support exhaustion of other remedies. *E.g.*, *Reiter v. Cooper*, 507 U.S. 258, 268-70 (1993) (exhaustion not required where agency lacked power to grant the requested relief); *Bowen v. City of New York*, 476 U.S. 467, 484 (1986) ("application of the exhaustion doctrine is 'intensely practical'"), *quoting Mathews v. Eldrige*, 424 U.S. 319, 331 n.11 (1976); *McKart v. United States*, 395 U.S. 185, 198 (1969) (exhaustion not required where only issue was one of statutory construction that did not require agency expertise). Similarly, the rule in the analogous area of federal/state abstention (*Iowa Mutual*, 480 U.S. at 16 n.8) is that a federal court will not defer to state proceedings where issues of federal law are predominant. *E.g.*, *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229, 236 (1984). Here, the Ninth Circuit failed even to consider the strong federal interest manifest in Price-Anderson in assuring the availability of a federal forum.

regulatory authority over non-members is vested elsewhere -- whether it be the state or federal government -- tribal adjudicatory jurisdiction is plainly lacking, and tribal remedies need not be exhausted. Here, because Congress has given the federal government exclusive regulatory authority over nuclear activities, exhaustion is not required.

The Court's cases recognize a variety of ways by which tribal regulatory power may be divested or diminished. For example, regulatory jurisdiction may be lacking because the dispute arose on lands over which the tribe lacks territorial sovereignty. In *Strate*, tribal jurisdiction was lacking because the federal government had granted a right-of-way across reservation trust lands to state authorities for a state highway. In *Brendale v. Confederated Tribes & Bands of Yakima Nation*, 492 U.S. 408 (1989), it was because portions of the reservation had been opened to predominantly non-Indian fee ownership. In *South Dakota v. Bourland*, 508 U.S. 679 (1993), it was because Congress had authorized non-Indian recreational use and Army Corps of Engineers regulatory control over certain reservation lands. In each instance, the tribe's regulatory jurisdiction over non-members' activities on specified lands was held to have been abrogated or diminished.

In other instances, tribal jurisdiction over non-members may be absent for reasons unrelated to particular land status. For example, because of the "inherent limitations on tribal powers that stem from their incorporation into the United States," tribes lack criminal jurisdiction over non-members, at least in the absence of express congressional authorization. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 209 (1978); *see also Duro v. Reina*, 495 U.S. 693 (1990).[48] Similarly, by statute Congress may assign civil regulatory

[48]*Duro v. Reina* held that inherent tribal powers did not include criminal jurisdiction over a non-member *Indian*. Congress subsequently granted that authority by affirmative legislation. Pub. L. No. 101-511, § 8077(c), 104 Stat. 1892 (1991), *amending* 25 U.S.C. § 1301(2).

jurisdiction in a manner that is inconsistent with assertions of tribal jurisdiction.[49] That has occurred in the case of nuclear activities, where exclusive jurisdiction clearly lies with the federal government by virtue of the Atomic Energy Act and its Price-Anderson amendments. *E.g., Pacific Gas & Elec.*, 461 U.S. at 207; *Silkwood v. Kerr-McGee*, 464 U.S. at 248.

Accordingly, exhaustion of tribal remedies should not be required in this case. The arguments of El Paso and Cyprus that the AEA and Price-Anderson preempt tribal causes of action and thus bar jurisdiction over tribal law claims present issues solely of federal law, not issues of fact or tribal law. There is nothing the tribal courts can say or do that will clarify or elucidate those issues, even if long years of complex and costly litigation are endured. As in *Strate*, exhaustion "would serve no purpose other than delay." 520 U.S. at 460 n.14. Moreover, an exhaustion requirement would undermine both the objectives and the logic of the congressional act of preemption: to secure uniform and efficient disposition of nuclear claims under a federal law regime.

* * * *

For these reasons, the Court should hold that exhaustion of tribal remedies is inappropriate in this case, and that respondents' tribal law claims for nuclear torts have been preempted by federal law. Indeed, preemption here has rendered the tribal remedies a nullity -- there are simply no such remedies to exhaust. The appropriate recourse for respondents' alleged injuries is a Price-Anderson claim filed in federal court.

[49]*See, e.g., Northern States Power Co. v. Prairie Island Mdewakenton Sioux Indian Community*, 991 F.2d 458 (8th Cir. 1993) (tribal ordinance regulating transportation of hazardous materials across reservation lands was preempted by federal Hazardous Materials Transportation Act); *Blue Legs v. Bureau of Indian Affairs*, 867 F.2d 1094 (8th Cir. 1989) (federal Resource Conservation and Recovery Act preempts tribal authority over hazardous waste site).

III. The Ninth Circuit Improperly Reversed the District Court's Injunctive Orders from Which No Appeal Had Been Taken.

Neither the Neztsosies nor Ms. Richards pleaded any Price-Anderson claims in their tribal court complaints. Their suits rest entirely on tribal law. The district court, however, entered preliminary injunctive orders that prohibited them from adding Price-Anderson claims in the tribal proceedings. Respondents did not appeal from those orders, or cross-appeal when El Paso and Cyprus noticed their respective appeals from the district court's refusal to enjoin the tribal law claims. Notwithstanding these facts, the Ninth Circuit *sua sponte* asserted jurisdiction over the injunctive orders and reversed, citing "important comity considerations involved" in the relationship of the federal courts and the Navajo tribal courts. (App. 81a-82a)

The Ninth Circuit was clearly in error. Uniform controlling authority has held that an appellee who fails to cross appeal from a trial court order may not attack that order with a view to enlarging his or her rights or reducing the rights of the opposing party. *E.g.*, *Morley Constr. Co. v. Maryland Cas. Co.*, 300 U.S. 185, 191-93 (1937) (appellate court may not "give a new measure of relief" to appellee); *Miller v. Butcher Distribs.*, 89 F.3d 265, 267 (5th Cir. 1996); *Sherman v. Community Consol. Sch. Dist. 21*, 980 F.2d 437, 441 (7th Cir. 1992). Likewise, "[a] cross-petition is *required* . . . when the respondent seeks to alter the judgment below." *Northwest Airlines, Inc. v. County of Kent, Mich.*, 510 U.S. 355, 364 (1994) (emphasis added). *See also Torres v. Oakland Scavenger Co.*, 487 U.S. 312 (1988) (courts may not waive the jurisdictional requirements of Federal Rules of Appellate Procedure 3 and 4).

The only authority cited by the Ninth Circuit for its "comity" exception to this jurisdictional rule was *Stone v. City & County of San Francisco*, 968 F.2d 850 (9th Cir. 1992). *Stone*, however, dealt with the very different question of whether an appellate court was entitled to consider a new *legal*

argument, not raised by the parties, to vacate an order that appellants had properly brought within the appellate court's jurisdiction. *See id.* at 855. Here, by contrast, the Ninth Circuit exceeded its jurisdiction by overturning orders that were not before it.[50]

In any event, even if this Court were to conclude that the Ninth Circuit did not exceed its jurisdiction, the district court orders were plainly correct. There is absolutely no indication that Congress intended to authorize tribal courts to adjudicate the federal law causes of action established by the 1988 Price-Anderson Amendments. To the contrary, the 1988 Amendments were written to ensure federal court jurisdiction at the request of any party to the action or at the request of either the NRC or Department of Energy. Congress thus provided for original federal court jurisdiction for any public liability action (42 U.S.C. § 2210(n)(2)), for removal of actions pending in state courts at the request of any party or the NRC or Department of Energy (*id.*), and for special federal court caseload management panels to supervise related cases (*id.* § 2210(n)(3)). These provisions and the broader congressional objective of "equitable and uniform treatment of victims of a nuclear accident" (H.R. Rep. No. 100-104, pt. 1, at 18) would be frustrated by granting tribal courts the authority to exercise jurisdiction over Price-Anderson claims.

---

[50]It should be noted that this Court has not engaged in the practice of *sua sponte* raising tribal exhaustion questions where the issue was not properly preserved and presented. *E.g.*, *Alaska v. Native Village of Venetie*, 118 S. Ct. 948 (1998); *South Dakota v. Bourland*, 508 U.S. 679 (1993); *Brendale v. Confederated Tribes & Bands of Yakima Nation*, 492 U.S. 408 (1989).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

Lynn H. Slade
Walter E. Stern
MODRALL, SPERLING
ROEHL, HARRIS &
SISK, P.A.
500 Fourth Street N.W.
Nations Bank Tower,
Suite 1000
Albuquerque, NM 87102
(505) 848-1800

James R. Atwood*
Richard A. Meserve
COVINGTON & BURLING
1201 Pennsylvania Ave. N.W.
P.O. Box 7566
Washington, D.C., 20044-7566
(202) 662-6000

Tom Galbraith
Dawn M. Bergin
LEWIS & ROCA
40 North Central Avenue
Phoenix, AZ 85004
(602) 262-5311

Attorneys for Petitioners

* Counsel of Record

Dated: December 8, 1998

Supreme Court, U.S.
FILED
JAN 14 1999
CLERK

(14)

No. 98-6

IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

EL PASO NATURAL GAS COMPANY, *et al.*,
Petitioners,
v.
LAURA NEZTSOSIE, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF FOR RESPONDENTS

H. BARTOW FARR, III
RICHARD G. TARANTO
FARR & TARANTO
1850 M Street, N.W.
Washington, DC 20036
(202) 775-0184

MOSHE MAIMON
STEVEN J. PHILLIPS
LEVY, PHILLIPS & KONIGSBERG LLP
520 Madison Ave.
New York, NY 10022
(212) 605-6200

MAX W. BERGER
SETH RICHARD LESSER *
LOUIS C. PAUL
BERNSTEIN LITOWITZ BERGER & GROSSMANN LLP
1285 Avenue of the Americas
New York, NY 10019
(212) 554-1400

CHERIE V. DAUT
P.O. Box 269
Farmington, NM 87499
(505) 368-5927

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

60pp

BEST AVAILABLE COPY

QUESTIONS PRESENTED

Petitioners have sought a federal-court injunction to bar respondents' prosecution of tort claims against them in Navajo tribal court. Relying on the Price-Anderson Act, petitioners contend that they are not required to exhaust their jurisdictional objections in the tribal court under the principles set forth in *National Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845 (1985), and *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9 (1987). The Questions Presented with respect to exhaustion of remedies are as follows:

1. Whether the Price-Anderson Act contains an express prohibition on tribal-court jurisdiction over "public liability actions."

2. Whether the tort claims asserted by respondents—which are based on activities apparently outside the substantive scope of the Price-Anderson Act and of the Atomic Energy Act—"patently" fall within the category of "public liability actions."

Petitioners have also argued that the first of these issues is not properly before the Court. The Question Presented with respect to that argument is as follows:

3. Whether the court of appeals, having jurisdiction over petitioners' appeal of the orders against them, was absolutely barred from reviewing the preliminary injunctions against respondents, in the absence of a cross-appeal.

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	v
STATEMENT	1
I. Statutory Framework	2
A. Jurisdiction Over Public Liability Actions	3
B. The Scope of Public Liability Actions	3
1. Safety Regulation Under the Atomic Energy Act	3
2. Indemnification Under The Price-Anderson Act	6
II. Tribal Court Actions	10
III. Federal District Court Proceedings	12
IV. Court of Appeals Decision	13
SUMMARY OF ARGUMENT	15
ARGUMENT	18
I. The Tribal-Court Exhaustion Requirement Bars The Requested Injunctions Against Tribal-Court Proceedings Unless The Tribal Court's Jurisdiction Would Be Patently Violative Of An Express Jurisdictional Prohibition	18
II. Respondents' Claims Do Not Patently Fall Within The Price-Anderson Act, And Exhaustion Would Serve The Purpose Of Developing A Record Necessary To A Proper Determination Of The Act's Applicability To The Tribal-Court Actions	23
III. The Cross-Appeal Rule Is Not An Absolute Bar That Precluded The Court Of Appeals From Reviewing The Preliminary Injunctions Against Respondents	40

TABLE OF CONTENTS—Continued

	Page
IV. The Price-Anderson Act Does Not Expressly Prohibit Tribal-Court Jurisdiction To Adjudicate Public Liability Claims	44
CONCLUSION	49

TABLE OF AUTHORITIES

Cases	Page
Arizona Public Serv. Co. v. Office of Navajo Labor Relations, N.L.R. Supp. 162 (Nav. Sup. Ct. 1990)	47
Atlantic Coast Line R.R. v. Brotherhood of Locomotive Engineers, 398 U.S. 281 (1970)	19
Becenti v. Vigil, 902 F.2d 777 (10th Cir. 1990)	26, 27
Begay v. United States, 591 F. Supp. 991 (D. Az. 1984), *aff'd*, 768 F.2d 1059 (9th Cir. 1985)	5, 29
Bowen v. United States Postal Service, 459 U.S. 212 (1983)	43
Bryant v. Technical Research Co., 654 F.2d 1337 (9th Cir. 1981)	41
Champagne v. Schlesinger, 506 F.2d 979 (7th Cir. 1974)	41
City of Chicago v. Int'l College of Surgeons, 118 S. Ct. 523 (1998)	19
Coeur D'Alene Tribe v. AT&T Corp., 23 I.L.R. 6060 (Coeur D'Alene Tr. Ct. 1996)	47
Colorado River Water Conservation District v. United States, 424 U.S. 800 (1976)	19
Colville Confederated Tribes v. Stock West, Inc., 21 I.L.R. 6075 (Colv. Tr. Ct. 1994)	47
Crow Tribe of Indians v. Santala, 21 I.L.R. 6096 (Crow Tribal Ct. 1994)	47
Duke Power Co. v. Carolina Environmental Study Group, Inc., 438 U.S. 59 (1978)	6, 7, 33
Estate of Jumbo, N.L.R. Supp. 112 (Nav. Sup. Ct. 1990)	47
Estate of Tasunke Witko (Crazy Horse) v. G. Heileman Brewing Co., 23 I.L.R. 6104 (Rosebud Sioux Sup. Ct. 1996)	47
Fidelity Federal Savings & Loan Ass'n v. De La Cuesta, 458 U.S. 141 (1982)	48
Franchise Tax Board v. Construction Laborers Vacation Trust, 463 U.S. 1 (1983)	34
Freeman v. B&B Associates, 790 F.2d 145 (D.C. Cir. 1986)	41
Gilberg v. Stepan Co., 24 F. Supp. 2d 325, *aff'd*, Letter Order and Opinion (D.N.J. Dec. 14, 1998)	35

TABLE OF AUTHORITIES—Continued

	Page
Goodyear Atomic Corp. v. Miller, 486 U.S. 174 (1988)	4
Granberry v. Greer, 481 U.S. 129 (1987)	20
Gulf Offshore Co. v. Mobil Oil Corp., 453 U.S. 473 (1981)	25, 45, 48
Gutierrez de Martinez v. Lamagno, 515 U.S. 417 (1995)	37
Hopi Tribe v. Manycow, 21 I.L.R. 6080 (Hopi Tr. Ct. 1994)	47
In re Hanford Nuclear Reservation Litigation, 780 F. Supp. 1551 (E.D. Wash. 1991)	48
In re TMI, 67 F.3d 1119 (3d Cir. 1995), *cert. denied*, 517 U.S. 1163 (1996)	33
In re TMI Litigation Cases Consolidated II, 940 F.2d 832 (3d Cir. 1991), *cert. denied*, 503 U.S. 906 (1992)	33
International Primate Protection League v. Administrators of Tulane Education Fund, 500 U.S. 72 (1991)	27, 45, 46
Iowa Mutual Ins. Co. v. LaPlante, 480 U.S. 9 (1987)	*passim*
John Hancock Mutual Life Ins. Co. v. Harris Trust & Sav. Bank, 510 U.S. 86 (1993)	39
Juidice v. Vail, 430 U.S. 327 (1977)	19
Kelly v. Robinson, 479 U.S. 36 (1986)	39
Kerr-McGee Corp. v. Farley, 115 F.3d 1498 (10th Cir. 1997), *cert. denied*, 118 S. Ct. 880 (1998)	14
King v. St. Vincent's Hospital, 502 U.S. 215 (1991)	39
Langnes v. Green, 282 U.S. 531 (1931)	42, 43
Livadas v. Bradshaw, 512 U.S. 107 (1994)	25
Massachusetts v. Morash, 490 U.S. 107 (1989)	39
Mastro Plastics Corp. v. NLRB, 350 U.S. 270 (1956)	39
Merrell Dow Pharmaceuticals Inc. v. Thompson, 478 U.S. 804 (1986)	34, 38
Merrion v. Jicarilla Apache Tribes, 455 U.S. 130 (1982)	46
Mesa v. California, 489 U.S. 121 (1989)	37, 38

TABLE OF AUTHORITIES—Continued

	Page
Montana v. Blackfeet Tribe of Indians, 471 U.S. 759 (1985)	46
Montana v. United States, 450 U.S. 544 (1981)	21, 22
Morley Constr. Co. v. Maryland Casualty Co., 300 U.S. 185 (1937)	42
National Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845 (1985)	*passim*
Northwest Airlines, Inc. v. County of Kent, 510 U.S. 355 (1994)	42
Pacific Gas & Electric Co. v. State Energy Resources Conservation & Devel. Comm'n, 461 U.S. 190 (1983)	4
Pan-Pacific and Low Ball Cable Television Co. v. Pacific Union Co., 987 F.2d 594 (9th Cir. 1993)	41
Pela v. Peabody Coal Co., N.L.R. Supp. 156 (Nav. Sup. Ct. 1990)	47
Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41 (1987)	39
Piper Aircraft Co. v. Reyno, 454 U.S. 235 (1981)	42
Quackenbush v. Allstate Ins. Co., 517 U.S. 706 (1996)	19
Richards v. United States, 369 U.S. 1 (1962)	48
Rivet v. Regions Bank of Louisiana, 118 S. Ct. 921 (1998)	28
Robicheaux v. Radcliff Material, Inc., 697 F.2d 662 (5th Cir. 1983)	41
Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978)	47
Shamrock Oil & Gas Corp. v. Sheets, 313 U.S. 100 (1941)	28
Shell Oil Co. v. Iowa Dep't of Revenue, 488 U.S. 19 (1988)	39
Shoshone Mining Co. v. Rutter, 177 U.S. 505 (1900)	38
Shulthis v. McDougal, 225 U.S. 561 (1912)	38
Silkwood v. Kerr-McGee Corp., 464 U.S. 238 (1984)	*passim*
Smith v. United States, 508 U.S. 223 (1993)	39
Spann v. Colonial Village, Inc., 899 F.2d 24 (D.C. Cir. 1986), *cert. denied*, 498 U.S. 980 (1990)	41

TABLE OF AUTHORITIES—Continued

	Page
Stibitz v. General Public Utilities Corp., 746 F.2d 993 (3d Cir. 1984), *cert. denied*, 469 U.S. 1214 (1985)	9
Strate v. A-1 Contractors, 520 U.S. 438 (1997)	*passim*
Tafflin v. Levitt, 493 U.S. 455 (1990)	44
Torres v. Oakland Scavenger Co., 487 U.S. 312 (1988)	43, 44
United States v. Bohn, 959 F.2d 389 (2d Cir. 1992)	41
United States v. New York Telephone Co., 434 U.S. 159 (1977)	42
United States v. Plainbull, 957 F.2d 724 (9th Cir. 1992)	47
United States v. Tabor Court Realty Corp., 943 F.2d 335 (3d Cir. 1991), *cert. denied*, 502 1093 (1992)	41
White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980)	46

Statutes, Regulations & Rules

7 Navajo Tribal Code § 204 (a)	47
25 U.S.C. § 1302	47
§ 3601	20, 21
28 U.S.C. § 1292 (a) (1)	13
§ 1331	26
§ 1346 (b)	48
§ 1441	26
§ 1442	26
§ 1446	8, 16, 26, 45
§ 1451	26
§ 2107	43
§ 2283	19
29 U.S.C. § 185	24, 25
§ 1132 (a)	24
42 U.S.C. § 2011	6
§ 2012 (i)	7
§ 2014	6

TABLE OF AUTHORITIES—Continued

	Page
§ 2014 (j)	8, 35
§ 2014 (q)	8, 30, 34
§ 2014 (t)	*passim*
§ 2014 (w)	8
§ 2014 (z)	4
§ 2014 (hh)	*passim*
§ 2023 (c)	26
§ 2039	7
§ 2092	5
§ 2210	6, 8, 10
§ 2210 (a)	7
§ 2210 (b)	7
§ 2210 (	6, 7
§ 2210 (d)	7
§ 2210 (e)	7
§ 2210 (j)	8
§ 2210 (n) (1)	8
§ 2210 (n) (2)	*passim*
§ 2210 (p)	7
§ 2210 (s)	33
§ 7901	6
§ 7915	6
43 U.S.C. § 1331	25
§ 1333 (a) (1)	10
§ 1349 (b) (1)	10
48 U.S.C. § 864	26
Federal Courts Improvement Act of 1996, Pub. L. No. 104-317, § 206, 110 Stat. 3850	27
Federal Metal and Nonmetallic Mine Safety Act of 1966, Pub. L. No. 89-577, 80 Stat. 772	6
Federal Mine Safety and Health Amendments Act of 1977, 30 U.S.C. § 801	6
Pub. L. No. 85-256, 71 Stat. 576 (1957)	6, 7
Pub. L. No. 89-645, 80 Stat. 891 (1966)	8, 9
Pub. L. No. 100-408, 102 Stat. 1066 (1988)	6
Radiation Exposure Compensation Act, Pub. L. No. 101-426, 104 Stat. 920 (1990)	6
Uranium Mill Tailings Radiation Control Act of 1978, Pub. L. No. 95-604, 92 Stat. 3021	6

TABLE OF AUTHORITIES—Continued

	Page
Fed. R. App. P. 3	43
Fed. R. App. P. 4	43
Fed. R. Civ. P. 58	40
Fed. R. Civ. P. 65(c)	13
Sup. Ct. Rule 12.6	43
14.1(a)	42
47	26
10 C.F.R. §§ 140.81-.85	35
Office of General Counsel, U.S. Dep't of Energy, Notice of Inquiry Concerning Preparation of Report to Congress on the Price-Anderson Act, 62 Fed. Reg. 68272 (Dec. 31, 1997)	34

Congressional Materials

Clean-Up of Abandoned Uranium Mine & Mine Waste on the Navajo Reservation, Hearing before Subcomms. on Oversight and Investigations and Native American Affairs, House Comm. on Natural Resources, 103d Cong., 1st Sess. (1993)	30
134 Cong. Rec. 19812 (1988)	33
139 Cong. Rec. S8096 (1993)	27
H7012 (1993)	27
140 Cong. Rec. H155 (1994)	27
S3444 (1994)	27
141 Cong. Rec. S2831 (1995)	27
143 Cong. Rec. S5153 (1997)	27
Health Impact of Low-Level Radiation, 1979, Joint Hearing before the Subcomm. on Health and Scientific Research of Senate Committees on Labor and Human Resources and Judiciary, 96th Cong., 1st Sess. (1979)	29
H.R. Rep. 435, 85th Cong., 1st Sess. (1957)	7, 32
H.R. Rep. 1480, Part I, 95th Cong., 2d Sess. (1978)	6
H.R. Rep. 104, Part 1, 100th Cong., 1st Sess. (1987)	10, 32, 36
H.R. Rep. 205, 103d Cong., 1st Sess. (1993)	21
H.R. Conf. Rep. 383, 103d Cong., 1st Sess. (1993)	21

TABLE OF AUTHORITIES—Continued

	Page
An Interim Report of a Health Study of the Uranium Mines and Mills by the Federal Security Agency [later the Department of Health, Education, and Welfare], Public Health Service, Division of Occupational Health, and the Colorado State Department of Public Health, May 1952, in *Mine Safety*, Hearings and Report before the House Committee on Education and Labor, 84th Cong., 2d Sess. (1956)	4
Proposed Amendments to Price-Anderson Act Relating to Waiver of Defenses, Hearing before the Joint Comm. on Atomic Energy, 89th Cong., 2d Sess. (1966)	7, 32, 36
Radiation Exposure of Uranium Miners, Hearings before the Subcomm. on Research, Development, and Radiation of the Joint Comm. on Atomic Energy, 90th Cong., 1st Sess. (1967)	5, 29
Reauthorization of the Price-Anderson Act, Hearing before the Subcomm. on Nuclear Regulation of the Senate Comm. on Environment and Public Works, 99th Cong., 1st Sess. (1986)	32, 36, 37
Report by the Comptroller General, in *Price-Anderson Act*, Hearing before the Subcomm. on Energy Research and Production of the House Comm. on Science and Technology, 97th Cong., 1st Sess. (1981)	32, 33
S. Rep. 296, 85th Cong., 1st Sess. (1957)	7, 32
S. Rep. 1605, 89th Cong., 2d Sess. (1966)	*passim*
S. Rep. 70, 100th Cong., 1st Sess. (1987)	7, 32
S. Rep. 218, 100th Cong., 1st Sess. (1987)	36
S. Rep. 88, 103d Cong., 1st Sess. (1993)	21

Other Materials

15A C. Wright, A. Miller, & E. Cooper, *Federal Practice and Procedure* (1992)	41
16 C. Wright, A. Miller, & E. Cooper, *Federal Practice and Procedure* (1996)	40

TABLE OF AUTHORITIES—Continued

	Page
Note, *Unfinished Business: The Regulation of Uranium Mining and Milling*, 18 U. Richmond L. Rev. 615 (1984)	5, 30
P. Eichstaedt, *If You Poison Us: Uranium and Native Americans* (1994)	3
R. Stern, E. Gressman, S. Shapiro, & K. Geller, *Supreme Court Practice* (7th ed. 1993)	42
Royster, *Statute and Scrutiny: Post-Exhaustion Review of Tribal Court Decisions*, 46 U. Kan. L. Rev. 214 (1998)	46
Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U.L. Rev. 543 (1985)	38
Snyder *et al.*, *Infantile Onset and Late Central White Matter Lesions in Navajo Neuropathy*, 24 Ann. Neurol. 327 (1988)	10
U.S. Nuclear Regulatory Commission, *The Price-Anderson Act—Crossing the Bridge to the Next Century: A Report to Congress* (August 1, 1998)	6, 33

IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

No. 98-6

EL PASO NATURAL GAS COMPANY, *et al.*,
Petitioners,
v.
LAURA NEZTSOSIE, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR RESPONDENTS

STATEMENT

The principles set forth by this Court in *National Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845 (1985), and *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9 (1987), demand that petitioners establish two propositions in order to have a federal court bypass the usual exhaustion requirements and enjoin the previously filed actions in tribal court. First, they must establish that tribal courts have been expressly stripped of jurisdiction to adjudicate any "public liability action" under the Price-Anderson Act, 42 U.S.C. §§ 2014(hh), 2210(n)(2). Second, they must also establish that respondents' claims so patently fall into the category of covered "public liability action[s]" that exhaustion of that question in the tribal courts would be pointless.

Although petitioners seem to think otherwise, respondents do not dispute that, *if* their tribal-court claims are

properly deemed to be "public liability" claims, the claims cannot simultaneously survive as something else (say, tribal-law or state-law claims). Our position, instead, is that respondents' claims are not (and, certainly, are not clearly) within the scope of "public liability actions" and that, even if they were, Congress has not expressly barred tribal courts from exercising jurisdiction over them. The Ninth Circuit held that the tribal courts should first be allowed to address their own jurisdiction over "public liability actions," thus finding no immediate need to decide whether respondents' claims are properly deemed to be in that class. As we discuss, we think that both issues are properly left to the tribal courts in the first instance.

I. Statutory Framework

The relevant statutory provisions bearing on these issues differ in content and in complexity. With respect to whether tribal courts may hear "public liability actions," the statutory analysis is simple: the Act gives federal courts jurisdiction over such actions, and authorizes their removal from state courts, but does not expressly take away the authority of tribal courts—otherwise conceded to extend to suits involving activities on tribal land—to hear such actions. *See* Argument IV, *infra*. With respect to what claims fall within the intended scope of "public liability actions," the proper analysis depends on the broader context of the Price-Anderson Act as a whole and of the Atomic Energy Act of which it is a part. The critical facts, based on the record to date, are that the injury-causing actions and omissions at issue here were (a) not subject to the safety-regulation scheme of the Atomic Energy Act, which has not been read to cover the very first stage in the production of nuclear fuel, namely, uranium *mining*, and (b) not subject to any indemnification agreement under the Price-Anderson Act or, therefore, the Act's substantive provisions. The central statutory question, raising significant Article III issues, is whether Congress meant the jurisdiction-related "public liability action" standard to extend to a case where the defendants are not themselves

"liable for public liability" (42 U.S.C. § 2014(t)) and where the Atomic Energy Act's regulatory interest does not apply. *See* Argument II, *infra*.

A. *Jurisdiction Over Public Liability Actions*

The Price-Anderson Act provides for original federal jurisdiction, "without regard to the citizenship of any party or the amount in controversy," over a particular class of cases: "any public liability action arising out of or resulting from a nuclear incident." 42 U.S.C. § 2210 (n)(2). First enacted in 1966, the provision originally conferred jurisdiction only over public liability actions "arising out of or resulting from an extraordinary nuclear occurrence." After the Nuclear Regulatory Commission had determined that the 1979 incident at Three Mile Island was not an "extraordinary nuclear occurrence," Congress amended the statute in 1988 to its current form.

Section 2210(n)(2), while conferring jurisdiction on federal district courts, does not confer exclusive jurisdiction. It provides that "[u]pon motion of the defendant or of the Commission, or the Secretary, as appropriate, any such action [*i.e.*, public liability action] pending in any State court . . . shall be removed . . . to the United States district court having venue under this subsection." The section also provides for transfer within the federal-court system. The Act does not provide for removal from tribal courts.

B. *The Scope of Public Liability Actions*

1. *Safety Regulation Under the Atomic Energy Act.* This case involves claims of personal injury and wrongful death arising out of a particular activity: petitioners' mining of uranium from the 1950s through the middle 1960s on lands leased from the Navajo Nation. Uranium mining was heavily concentrated in the Four Corners area of the southwestern part of the United States, and much of it took place on the Navajo Reservation. *See* P. Eichstaedt, *If You Poison Us: Uranium and Native Americans* ix, xv, 23-24, 35-36, 89 (1994); *id.* at 2-3 (map of area

showing Reservations and mines). Federal authorities recognized that these mines were concentrated on Indian (including Navajo) lands and that they posed significant potential health hazards. *See id.* at 35, 36, 51.[1]

There is no question that nuclear-related activities have been and are subject to broad federal regulation, including various activities involving uranium, which is a "source material" under the Atomic Energy Act. 42 U.S.C. § 2014(z). In *Pacific Gas & Electric Co. v. State Energy Resources Conservation & Devel. Comm'n*, 461 U.S. 190 (1983), this Court, while actually rejecting a claim that certain state authority was preempted, nonetheless declared that the Atomic Energy Act gave the Atomic Energy Commission "exclusive jurisdiction to license the transfer, delivery, receipt, acquisition, possession, and use of nuclear materials" and that "[u]pon these subjects, no role was left for the States." *Id.* at 207; *see id.* at 205 ("the federal government should regulate the radiological safety aspects involved in the construction and operation of a nuclear plant").[2] That sphere of exclusivity, however, has long been subject to an important limitation: based on the statutory language requiring licenses for "source

[1] *See An Interim Report of a Health Study of the Uranium Mines and Mills* by the Federal Security Agency [later the Department of Health, Education, and Welfare], Public Health Service, Division of Occupational Health, and the Colorado State Department of Public Health, May 1952, in *Mine Safety*, Hearings and Report before the House Committee on Education and Labor, 84th Cong., 2d Sess. 305-16, 307 (1956).

[2] The Court later made clear in *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1984), however, that the Commission's "exclusive authority to regulate safety matters" does not extend beyond direct regulation to preempt traditional state-law standards of care applied to impose tort liability, even punitive damages, despite the "regulatory" pressure such standards can exert. *Id.* at 256; *see Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 186 (1988) (describing *Silkwood* as holding that "Congress was willing to accept regulatory consequences of application of state tort law to radiation hazards even though direct state regulation of safety aspects of nuclear energy was pre-empted").

material" only "after removal from its place of deposit in nature" (42 U.S.C. § 2092), uranium *mining* on non-federal lands has apparently long been regarded as outside the purview of the Act. Instead, such mining activities were the subject of the very sort of direct regulation by the States that was precluded for subjects within the preemptive reach of the Atomic Energy Act.[3]

This lack of regulation by the Commission was reflected in a Summary Report, issued by the 1961 Governors' Conference on Health Hazards in Uranium Mines—in which the Commission and other federal agencies participated—which specifically noted that the Commission's "authority is not regarded as extending to control of radiation hazards within uranium mines." *See Radiation Exposure of Uranium Miners*, Hearings before the Subcomm. on Research, Development, and Radiation of the Joint Comm. on Atomic Energy, 90th Cong., 1st Sess. 909 (1967) (reprinting 1961 report). That report also described some efforts to address hazardous conditions in uranium mines by other federal agencies—acting under authority wholly apart from the Atomic Energy Act (*see id.* at 908-09)—and pointed out that "[c]ontrol of these hazards was viewed by the conferees as a primary responsibility of the States" (*id.* at 910). The various federal efforts, undertaken outside the Atomic Energy Act regime, included

[3] *See* Note, *Unfinished Business: The Regulation of Uranium Mining and Milling*, 18 U. Richmond L. Rev. 615, 622-23, 638-40 (1984). This case does not involve federally owned lands subject to 42 U.S.C. § 2097.

Key aspects of the history of the Commission's disclaimer of authority over uranium mines are described in *Begay v. United States*, 591 F. Supp. 991, 1000-02 (D. Az. 1984), *aff'd*, 768 F.2d 1059 (9th Cir. 1985), where the Government relied on that very history to sustain its discretionary-function defense to a Federal Tort Claims Act suit by miners. *See id.* at 1001 ("it was always clear that the state governments regarded the regulation of mine health and safety as state business. Preemptive federal legislation providing for federal regulation of mine health and safety was something that neither the states nor the federal government desired.").

initiatives to address radioactive safety by the Secretary of Labor through rulemaking and by Congress through new legislation in the mid-1960s.[4] Relatedly, Congress enacted new statutes to provide for cleanup of uranium-mill tailings in 1978[5] and to provide compensation to uranium mineworkers in 1990.[6]

2. *Indemnification Under The Price-Anderson Act.* The Price-Anderson Act, enacted in 1957, amended the Atomic Energy Act by adding 42 U.S.C. § 2210, as well as associated definitions in 42 U.S.C. § 2014. Pub. L. No. 85-256, 71 Stat. 576 (1957).[7] From the beginning, the

[4] *See* Federal Metal and Nonmetallic Mine Safety Act of 1966, Pub. L. No. 89-577, 80 Stat. 772, superseded by Federal Mine Safety and Health Amendments Act of 1977, 30 U.S.C. § 801 *et seq.* For a description of the regulatory actions taken by Secretary of Labor Willard Wirtz, see *Radiation Exposure of Uranium Miners, supra*, at 88-95 (testimony and materials submitted by Wirtz).

[5] The Uranium Mill Tailings Radiation Control Act of 1978, Pub. L. No. 95-604, 92 Stat. 3021, amended various sections of the Atomic Energy Act, 42 U.S.C. § 2011 *et seq.*, and added a new chapter 88 to Title 42, U.S. Code (42 U.S.C. § 7901 *et seq.*). Recognizing the prevalence of uranium-polluted sites on Indian Reservations, the statute provides expressly for coordination with Indian tribes. *See* 42 U.S.C. § 7915; H.R. Rep. 1480, Part I, 95th Cong., 2d Sess. 15, 19, 33, 37, 39 (1978).

[6] Radiation Exposure Compensation Act, Pub. L. No. 101-426, 104 Stat. 920 (1990), set out at 42 U.S.C. § 2210 note.

[7] To ensure reevaluation in light of developing experience, Congress included a ten-year "expiration" date. *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 65 (1978). Congress has "extended the Act's coverage" (*id.* at 66) and amended it several times since 1957, always providing a critical sunset period to ensure congressional reconsideration. Under the currently applicable 1988 Amendments, Pub. L. No. 100-408, 102 Stat. 1066, the relevant expiration date is in 2002 (*see* 42 U.S.C. § 2210(c), (d)). To prepare for the reconsideration, Congress called for Government reports on the Price-Anderson Act by August 1, 1998. 42 U.S.C. § 2210(p). The Nuclear Regulatory Commission has submitted its report: *The Price-Anderson Act—Crossing the Bridge to the Next Century: A Report to Congress* (August 1, 1998) (*"1998 NRC Report"*). That report recommends, among other things, that "Congress should determine whether a public liability lawsuit arising

Act provided for indemnification agreements between the Government (as indemnitor) and certain nuclear licensees (as indemnitees), requiring the agreements in some cases, allowing them in others. *See* U.S. Br. 2-3. For accidents involving activities covered by such indemnification agreements, and only for such accidents, the Act limited the potential liability to be imposed, based on the amounts of the available Government indemnity (originally $500 million) plus required "financial protection" from private insurance. *See* 71 Stat. at 630-631 (original versions of current 42 U.S.C. § 2210(a)-(e)); *Duke Power*, 438 U.S. at 64-65. The Act thus served the dual purposes of "assuring public compensation for nuclear accidents, while at the same time providing the necessary incentives for private development of nuclear-produced energy." *Id.* at 89; *see* 42 U.S.C. § 2012(i) (congressional findings).[8]

This Court took note of the indemnity scheme in *Silkwood*, making clear that "the Price-Anderson Act does not apply"—in particular, neither its provisions limiting liability nor the other substantive provisions of the Act (§ 2210) apply—where (as in *Silkwood*) no indemnification (or associated financial protection) applies to the incident. 464 U.S. at 251 & n.12; *see* U.S. Br. 29 n.16. Where the indemnity and liability-limiting provisions do

or resulting from a nuclear incident may be filed in a tribal court. Further judicial developments relating to this issue may suggest consideration in connection with Price-Anderson renewal legislation." *Id.* at xxi.

[8] *See* S. Rep. 296, 85th Cong., 1st Sess. 8-9 (1957); H.R. Rep. 435, 85th Cong., 1st Sess. 8-9 (1957); S. Rep. 1605, 89th Cong., 2d Sess. 6 (1966); S. Rep. 70, 100th Cong., 1st Sess. 41 (1987); *Proposed Amendments to Price-Anderson Act Relating to Waiver of Defenses*, Hearings before the Joint Comm. on Atomic Energy, 89th Cong., 2d Sess. 3 (1966) (*"1966 Hearing"*).

At the same time, Congress acted to enhance the Commission's regulation of nuclear safety to minimize the possibility of liability in the first place. *See* 71 Stat. at 633 (adding original version of 42 U.S.C. § 2039); S. Rep. 85-296, at 9-10; H.R. Rep. 85-435, at 9-10; *see 1966 Hearing* at 9 ("Commission's safety program designed to eliminate need for resort to Price-Anderson").

apply, however, what they cover is defined in terms that have not materially changed since 1957. "Public liability" is defined to mean (with certain exceptions) "any legal liability arising out of or resulting from a nuclear incident." 42 U.S.C. § 2014(w). "Nuclear incident" is defined as "any occurrence, including an extraordinary nuclear occurrence, . . . causing . . . bodily injury, sickness, disease, or death . . . arising out of or resulting from the radioactive, toxic, explosive, or other hazardous properties of source, special nuclear, or byproduct material." 42 U.S.C. § 2014(q). And the class of persons liable for public liability is covered by the definition of the phrase "person indemnified," which means a person who has an indemnification agreement or is required to maintain financial protection, as well as "any other person who may be liable for public liability." 42 U.S.C. § 2014(t).[9]

The key "public liability" phrase also underlies the Price-Anderson Act's specific provisions on litigation. In 1966, Congress added a new subsection, 42 U.S.C. § 2210(n), to deal with claims arising out of any nuclear incident serious enough to constitute an "extraordinary nuclear occurrence," as determined by the Atomic Energy Commission, 42 U.S.C. § 2014(j). Pub. L. No. 89-645, 80 Stat. 891, 892. Paragraph (1) provided that indemnity agreements (or the insurance policies providing the initial layer of "financial protection") should contain waivers with respect to various "issue[s] or defense[s]" (timeliness, contributory fault, immunities) that would often arise in actions for liability growing out of such an event. Paragraph (2) then provided that a "public liability action" arising out of an extraordinary nuclear occurrence

[9] As we discuss, and as the Government agrees (U.S. Br. 29 n.16), the category of persons indemnified, which includes *all* persons liable for "public liability," has always been limited to situations involving liability subject to an indemnification agreement. *See* pages 31-33, *infra*. The Government's reference only to indemnity, without separate mention of financial protection, suggests that, in practice, the latter implies the former.

was within the original jurisdiction of the federal courts and, if "pending in any State court," might be removed for consolidation in a single district court (though it need not, *see* S. Rep. 89-1605, at 28). 80 Stat. at 892. Explaining this new jurisdictional provision, the Joint Committee on Atomic Energy specifically pointed out, and relied on, the benefit of coordinating litigation that sought the limited funds provided by the substantive provisions of the Act.[10]

The 1988 Amendments to the Act made several changes in its jurisdictional provisions. Most notably, without altering the definitions of "public liability" or "nuclear incident" in any material way, Congress amended Section 2210(n)(2) to apply to any "nuclear incident."[11] It also added, in the same jurisdictional provision, a requirement that any removal from a State court under the provision must occur within the period provided under 28 U.S.C. § 1446, the general removal-procedure statute. And, finally, seeking to furnish a constitutional basis for the expanded federal-court jurisdiction, Congress added a new definition of "public liability action" (*i.e.*, "any suit asserting public liability") and added a deemer clause, declaring that "[a] public liability action shall be deemed to be an

[10] The Committee noted that "knowledge by one court of what other affected courts were doing would be essential in the orderly distribution of Price-Anderson funds"—that is, funds available under the Act—and pointed to the "related problem . . . of apportioning *insurance and indemnity moneys* in such a way as to reserve sufficient funds for victims whose injuries may not become manifest until long after the nuclear incident." S. Rep. 89-1605, at 8 (emphasis added).

[11] Although the 1979 accident at the nuclear power plant at Three Mile Island for the first time generated substantial litigation involving the Act, and many lawsuits were consolidated in federal court, the Commission ultimately determined that the incident was not an "extraordinary nuclear occurrence" under the Act. The Third Circuit then held that the federal court lacked jurisdiction over claims arising out of the accident. *See Stibitz v. General Public Utilities Corp.*, 746 F.2d 993 (3d Cir. 1984), *cert. denied*, 469 U.S. 1214 (1985).

action arising under section 2210." § 2014(hh). Congress went on to provide, however, that "the substantive rules for decision in such action shall be derived from the law of the State in which the nuclear incident involved occurs, unless such law is inconsistent with the provisions of such section." *Id.*[12]

II. Tribal Court Actions

This case involves efforts by petitioners to enjoin the proceedings in two personal-injury lawsuits filed in the tribal courts of the Navajo Nation. The first of these suits was filed in April 1995 by respondents Laura and Arlinda Neztsosie, members of the Navajo Nation, against petitioner El Paso and its affiliate (collectively El Paso), seeking damages for injuries caused by conduct that took place on the Navajo Reservation—indeed, on "land leased from the Navajo Nation" (Pet. 2). J.A. 18a.[13] The complaint states that El Paso operated open-pit uranium mines from approximately 1950 to 1965 in the area of Cameron, Arizona, and that, upon cessation of mining activities, El Paso simply left the mines open and uncovered, where they collected large quantities of water. J.A. 19a. As a result of El Paso's "failure to properly, safely and adequately contain and handle uranium ore and uranium mining waste" (J.A. 20a), the water in the open pits became polluted with radioactive materials and a host of other toxic materials. J.A. 19a, 23a. El Paso failed to warn "of

[12] A relevant House Committee report, while recognizing that this provision for federal-court jurisdiction raised an Article III issue, observed that it was not "designing a new body of substantive law to govern" the cases that Congress was bringing into federal court. The Committee asserted its belief that the expansion of jurisdiction was constitutional and "note[d] that the Congress has used this approach in the Outer Continental Shelf Lands Act [43 U.S.C. §§ 1333(a)(1), 1349(b)(1)]." H.R. Rep. 104, Part 1, 100th Cong., 1st Sess. 18 (1987).

[13] The neurological injuries suffered by respondents are referred to as "Navajo Neuropathy." *See* Snyder *et al.*, *Infantile Onset and Late Central White Matter Lesions in Navajo Neuropathy*, 24 Ann. Neurol. 327 (1988) (abstract).

the potential for leakage and actual leakage of the hazardous radioactive and toxic materials into the air, ground water and soil." J.A. 21a. In the early 1970s, the Neztsosies used the water "for drinking, bathing, swimming, clothes laundering and stock watering." J.A. 19a. The complaint states five claims for relief: negligence; strict liability; outrageous conduct; misrepresentation, fraud, and deceit; and wanton and reckless disregard for health and well being, warranting exemplary damages. While asserting once that El Paso violated tribal laws (J.A. 23a), the complaint follows general practice by setting out the claims without specifying the governing law. J.A. 20a-26a.

The second lawsuit was filed by Zonnie Marie Dandy Richards, on her own behalf and on behalf of her deceased husband (Harold J. Richards, Sr.), likewise members of the Navajo Nation, against a predecessor corporation of petitioner Cyprus (along with other defendants who are not before this Court). J.A. 39a. The amended complaint, filed in January 1996, alleges that Mr. Richards resided from 1953 to 1959 near a uranium mine then operated by Cyprus on the Navajo Reservation—indeed, on Navajo trust land (J.A. 62a)—in Cane Valley, Arizona. J.A. 40a-41a. During that time, and without adequate warnings, Mr. Richards was exposed to water and air contaminated with radioactive and other toxic materials from Cyprus's operations, ultimately causing his death. J.A. 41a-56a.[14] The amended complaint states seven claims for relief: negligence; wrongful death from ultrahazardous activity; loss of consortium from negligence; loss of consortium from ultrahazardous activity; outrageous conduct; misrepresentation, fraud, and deceit; and wanton and reckless disregard for life and health, war-

[14] The amended complaint refers to a mill at the mine site, but Cyprus did not construct its "concentrator" at the site until 1964, after Mr. Richards left the area. Thus, only mining is at issue. The amended complaint also makes similar allegations based on the uranium milling activities that took place at Mexican Hat, Utah, where Mr. and Mrs. Richards lived from 1959 to 1965, but companies other than Cyprus were responsible for those activities.

ranting exemplary damages. J.A. 42a-59a. Like the *Neztsosie* complaint, the *Richards* complaint alleges in passing a violation of tribal laws (J.A. 46a, 54a) but does not specify the jurisdiction whose substantive law supplies the governing standards for the alleged claims.

III. Federal District Court Proceedings

El Paso and Cyprus filed suits in federal district court to stop the tribal-court cases. Both suits contended that there was a federal ouster of tribal-court jurisdiction, not because of anything in general federal Indian law limiting tribal-court jurisdiction, but rather because of the provisions of the Price-Anderson Act. Without pointing to any text in the Price-Anderson Act actually stating that tribal (or other nonfederal) forums lack authority in matters covered by the Act, El Paso and Cyprus rested their contention on two interlinked bases: the asserted exclusive federal *regulatory* role with respect to nuclear safety and the special jurisdictional regime of the Price-Anderson Act. Both companies moved for preliminary injunctions.

The district court in both cases granted part but not all of the requested preliminary injunctions, barring respondents from seeking relief "based upon the Price-Anderson Act in tribal court." J.A. 71a, 73a. That holding necessarily decided that, *if* respondents' claims come within the deemer clause of the Act (§ 2014(hh)), the tribal court has been ousted of jurisdiction to decide them. The district court refused, however, to grant a preliminary injunction against respondents' proceeding in tribal court altogether. That order would have required the district court to determine that respondents' claims actually do come within the deemer clause, and the court, citing the exhaustion doctrine, concluded that it should not decide that issue. It thus made clear that it was not "determin[ing] whether or not the provisions of the Price-Anderson Act have any application to the claims asserted by [respondents] in tribal court." J.A. 71a, 73a.[15]

[15] The Navajo district court in *Richards* had rejected Cyprus's jurisdictional argument, concluding that "[w]hether or not this is a 'nuclear incident' is a factual issue for trial." J.A. 64a. After the federal district court ruled, the Navajo district court in *Neztsosie* denied El Paso's motion to dismiss for lack of jurisdiction.

In partially denying and partially granting "a preliminary injunction" (J.A. 70a-71a, 72a-73a), the district court in both cases ordered the posting of a bond under Fed. R. Civ. P. 65(c), which applies only to a "restraining order or preliminary injunction," not to a final injunction (J.A. 71a, 73a). No final judgment was entered on the docket in either case. J.A. 3a, 5a. El Paso and Cyprus each subsequently filed a "preliminary injunction appeal" (1 Ct. App. Excerpts of Record CR 30 (El Paso); 2 Ct. App. Excerpts of Record CR 11 (Cyprus); *see also* J.A. 3a, 5a (docket sheets)); and in the Ninth Circuit, El Paso and Cyprus, as well as the court of appeals (J.A. 75a), regarded appellate jurisdiction as grounded only in 28 U.S.C. § 1292(a)(1), which covers only "interlocutory" orders. Appellants El Paso Natural Gas Company and Cyprus Companies' Joint Opening Brief at 2, 3. The Neztsosies and Ms. Richards did not take an interlocutory appeal from the preliminary orders precluding them from pursuing their claims in tribal court if those claims come within the deemer clause of the Act.[16]

IV. Court of Appeals Decision

The court of appeals affirmed in part and reversed in part. J.A. 74a-92a. The court held that, even if respondents' claims were deemed to arise under the Price-Anderson Act, the exhaustion doctrine of *National Farmers* and *Iowa Mutual* required petitioners to exhaust, in tribal court, their contention that the Price-Anderson Act ousted the tribal court of jurisdiction over those claims.

[16] Because the injunction against respondents was preliminary, it could be appealed at any time that it became an obstacle to the suits in tribal court: that is, if the tribal court decided that the suits were within the scope of the Price-Anderson Act. Without such a determination, however, the preliminary injunction against respondents was of no immediate effect, and both cases proceeded in tribal court.

J.A. 92a. It thus reversed the district court's preliminary injunctions against respondents, even though respondents had not filed cross-appeals. Having drawn that conclusion, the court then decided that it did not have to address whether respondents' claims in tribal court in fact came within the deemer clause of the Act (if they do not, there is concededly no jurisdictional objection). J.A. 92a. The court thus did not rule on the argument made by petitioners in their appeals seeking to broaden the relief that they had obtained in the district court.

In deciding the issue that it addressed, the Ninth Circuit noted that "[i]n this case, the parties only dispute the applicability of the 'express jurisdictional prohibition' exception" to the exhaustion requirement. J.A. 80a.[17] The court then held, in agreement with the decision of the Tenth Circuit in *Kerr-McGee Corp. v. Farley*, 115 F.3d 1498 (10th Cir. 1997), *cert. denied*, 118 S. Ct. 880 (1998), that the Price-Anderson Act "does not contain an express jurisdictional prohibition barring the Navajo Tribal Court from determining its jurisdiction over the Navajo Court Plaintiffs' claims." J.A. 82a. The Court explained that the Act, far from expressly prohibiting jurisdiction in tribal (or any other) court, "provides for *concurrent* rather than exclusive jurisdiction over claims arising from nuclear incidents." J.A. 86a. The Act "merely grants defendants the *right*, rather than the obligation, to remove such cases to federal court," and provides that right only with respect to state, not tribal, courts. *Id.* (citing § 2210(n)(2)). The court refused "to 'infer' a jurisdictional prohibition where no 'express' jurisdictional prohibition exists" (J.A. 91a), and it accordingly held that tribal-court proceedings should continue, without front-end interference by a federal court, even if respondents' claims came within the Price-Anderson Act (which the court declined to decide). Judge Kleinfeld dissented. J.A. 93a.

[17] The Ninth Circuit noted that the footnote about exhaustion in *Strate v. A-1 Contractors*, 520 U.S. 438, 459-60 n.14 (1997), had no application to the suits here, which arise out of activities on tribal land. J.A. 87a-88a n.5.

SUMMARY OF ARGUMENT

I. Petitioners seek the most intrusive form of federal-court intervention in tribal-court affairs: a determination that the tribal court lacks jurisdiction over cases pending before it—cases that unquestionably arise out of activities on tribal land—and an injunction to block the tribal court from any further proceedings. This Court has made clear, however, that, with very limited exceptions, "the federal policy supporting tribal self-government directs a federal court to stay its hand in order to give the tribal court a 'full opportunity to determine its own jurisdiction.'" *Iowa Mutual*, 480 U.S. at 15-16 (quoting *National Farmers*, 471 U.S. at 857). To come within the only exception possibly relevant here—that exercise of tribal-court jurisdiction "is patently violative of express jurisdictional prohibitions" (*National Farmers*, 471 U.S. at 856 n.21)—petitioners must establish two propositions: first, that Congress has, through the Price-Anderson Act, expressly prohibited tribal courts from adjudicating "public liability action[s]" and, second, that respondents' claims so patently come within that category that further proceedings in the tribal court would simply be abusive. Absent that two-part showing, the district court was required to stay its hand and allow the tribal-court system a full initial opportunity to judge its own jurisdiction over respondents' cases, with petitioners then free to return to federal court after the tribal-court proceedings are completed.

Petitioners have made neither part of the required showing. With respect to the first issue—the absence of an express jurisdictional prohibition—the Ninth Circuit correctly held that the Price-Anderson Act does not expressly prohibit tribal-court jurisdiction over "public liability" claims. Although petitioners argue (wrongly, we think) that the court of appeals lacked the power to consider that issue, the fact is that petitioners fare no better on the second exhaustion issue, which they appealed and the Ninth Circuit left undecided: respondents' claims are not within the category of "public liability" claims, much less "patently" so. Applying the standards of *National Farm-*

ers and *Iowa Mutual*, the district court thus acted properly in leaving that question for resolution by the tribal courts in the first instance.

II. In resolving the exhaustion issue that all parties agree is properly before this Court, the district court correctly held that, under the applicable exhaustion principles, the tribal courts should first address the question whether respondents' claims are "public liability" claims. The United States, acknowledging that a federal preemption defense is not enough to avoid exhaustion, nevertheless argues against exhaustion here on the ground that the Price-Anderson Act is a "complete preemption regime." That position, however, is infected by a fatal flaw. Even a completely preemptive statutory scheme does not *by itself* authorize federal-court interference with a previously filed action in a nonfederal forum or, for that matter, an initial federal-court determination whether a nonfederal claim is completely preempted. To perform those roles, what is needed is a separate *removal* provision, with the usual stay of proceedings in the nonfederal forum (28 U.S.C. § 1446(d)): a complete preemption provision merely supplies the answer to the questions that the removal statute places before the federal court. But Congress simply has not provided, either in the Price-Anderson Act or in the general federal removal statute, for removal from tribal courts.

The alternative argument made by petitioners—that the claims brought by respondents are so clearly within the deemer clause of the Act that exhaustion would be pointless—is at least focused on the right question, but it is likewise unavailing. To begin with, despite petitioners' insistence on the broad scope of Atomic Energy Act regulation over nuclear-related activities, it does not appear that the Commission has ever exerted regulatory authority over mining activities like those conducted by petitioners, choosing instead to leave those activities regulated at the state level. Moreover, with respect to the Price-Anderson Act, it is utterly implausible to think that Congress in-

tended the phrase "public liability action" to extend to suits, as those here apparently are, in which no defendant is, in the terms of the Act, "liable for public liability" (§ 2014(t)). To apply the deemer clause in the absence of any discernible federal interest—either Atomic Energy Act regulation of the activity at issue or the existence of an applicable indemnity agreement—not only would expand its scope beyond any logical connection to the terms and purposes of the statute of which it is a part, but would raise a serious question of Article III authority and the extent to which Congress intended to test and stretch such authority. Development of the record in the tribal court—far from "serv[ing] no purpose" (*Strate*, 520 U.S. at 460 n.14)—will thus identify the precise conduct at issue and what provisions of the Atomic Energy Act or the Price-Anderson Act, if any, apply to it. The record will then enable full consideration of the statutory issues.

III. These principles dispose of the issues that inarguably are before the Court. But we also believe that the decision of the Ninth Circuit to review the preliminary injunctions against respondents *sua sponte* was within its power. Here, the balance of interests favoring review is as lopsided as possible, indeed entirely one-sided. Most particularly, petitioners were not deprived of the sole interest that is protected by the cross-appeal rule—the interest in finality—because the orders, being interlocutory, are fully subject to appellate review when final judgments are entered. Furthermore, the important congressionally supported interest in granting respect to the authority of tribal courts, taken together with the practical interest in considering intertwined issues together, likewise supports the court of appeals' action. Although the cross-appeal rule is to be applied strictly, neither the experience of the lower courts (where exceptions have been allowed) nor the precedent of this Court demands that it be applied inflexibly, in the face of compelling reasons to the contrary.

IV. On the merits, the Ninth Circuit was right to conclude that the Price-Anderson Act does not contain an express jurisdictional prohibition on tribal courts' adjudica-

tion of "public liability" claims, which are deemed by Section 2014(hh) to arise under the Act. Nothing in the Act deprives any nonfederal forum of its otherwise-available adjudicatory jurisdiction over such claims; rather, the Act makes it quite clear that federal-court jurisdiction is not exclusive. Although the removal provision of the Act does permit defendants to remove cases from state courts—and thus, in effect, ousts the jurisdiction that state courts originally possess—that provision makes no similar mention of tribal courts. This different treatment of tribal courts reasonably reflects the fact that federal-district-court review is available after tribal-court proceedings, whereas state-court cases, if not removed, escape federal-court review except through the process of certiorari to this Court. And, for several reasons, the Act cannot be read as ousting (much less clearly ousting) tribal-court jurisdiction based simply on the nature of the particular claims: tribal courts regularly adjudicate federal-law issues; this Court has expressly rejected any premise of their alleged incompetence to decide complex federal-law issues; and it would be peculiarly inappropriate to oust tribal courts of jurisdiction where, as here, their own common-law standards may well supply the governing law. It is thus proper for the tribal courts to determine, in the first instance, whether they may exercise jurisdiction over the claims asserted before them.

ARGUMENT

I. The Tribal-Court Exhaustion Requirement Bars The Requested Injunctions Against Tribal-Court Proceedings Unless The Tribal Court's Jurisdiction Would Be Patently Violative Of An Express Jurisdictional Prohibition

A. This Court has made clear that tribal-court exhaustion is strictly required, subject to very limited exceptions, in the precise circumstances here: when a federal court is presented with a request by a tribal-court defendant in a pending case to declare the tribal court without jurisdiction and to stop the proceeding. *National Farmers*, 471 U.S. at 853-57. Indeed, the Court has demanded exhaus-

tion even when a tribal-court defendant seeks only to initiate parallel litigation in federal court, without trying to stop the tribal-court proceeding. *Iowa Mutual*, 480 U.S. at 14-19.[18] The Court has stressed two important bases for the exhaustion requirement. First, it serves the comity-based congressional "policy of supporting tribal self-government and self-determination." *National Farmers*, 471 U.S. at 856; *see Iowa Mutual*, 480 U.S. at 14-15. As the Court has observed, "[t]ribal courts play a vital role in tribal self-government . . ., and the Federal Government has consistently encouraged their development." *Id.* at 14-15 (footnote and citations omitted). Second, the requirement serves the traditional policies behind exhaustion requirements generally—allowing the full tribal-court system to consider "its own jurisdiction and to rectify any errors it may have made" and allowing "a full record to be developed" that includes, for the benefit of any later federal-court review, the tribal court's identification of "the precise basis for accepting jurisdiction" and its evaluation of "the factual and legal bases for the challenge" to jurisdiction. *National Farmers*, 471 U.S. at 856-57; *see Iowa Mutual*, 480 U.S. at 15-17.

Emphasizing the importance of this requirement, as a necessary protection against otherwise-routine efforts by defendants to seek federal-court interference with tribal-

[18] Justice Stevens dissented in part in *Iowa Mutual* on the ground that the *Iowa Mutual* case (unlike *National Farmers*) involved an effort to initiate concurrent proceedings rather than an effort to have the federal court stop the nonfederal proceeding. 480 U.S. at 20-22. Justice Stevens noted that, in the state-federal context, the principle limiting a federal-court action brought to stop state proceedings (*see Juidice v. Vail*, 430 U.S. 327 (1977); *see also* Anti-Injunction Act, 28 U.S.C. § 2283; *Atlantic Coast Line R.R. v. Brotherhood of Locomotive Engineers*, 398 U.S. 281 (1970)) is different from and much stronger than the principle of abstention allowing avoidance of concurrent state-federal proceedings (*see Colorado River Water Conservation District v. United States*, 424 U.S. 800, 813-16 (1976)). *See* 480 U.S. at 21-22. *See also City of Chicago v. Int'l College of Surgeons*, 118 S. Ct. 523, 534 (1998); *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706 (1996).

court jurisdiction, this Court has described the exhaustion rule as an "inflexible bar to consideration of the merits." *Granberry v. Greer*, 481 U.S. 129, 131 n.4 (1987). The Court, accordingly, has recognized only three exceptions to the exhaustion requirement: where an assertion of tribal jurisdiction is made in bad faith or for harassment; where lack of an adequate opportunity to challenge the jurisdiction makes exhaustion futile; and "where the action is patently violative of express jurisdictional prohibitions." *National Farmers*, 471 U.S. at 856 n.21; *Iowa Mutual*, 480 U.S. at 19 & n.12. In keeping with the strict nature of these exceptions—amounting to situations in which the tribal courts' exercise of jurisdiction would be a clear abuse of power—the Court has declined to add another exception based on "[t]he alleged incompetence of tribal courts," commenting that any such exception "would be contrary to the congressional policy promoting the development of tribal court." *Id.* at 19. The Court has indicated, however, that federal-court review is available *after* tribal-court exhaustion. *Id.*

This commitment to federal respect for tribal courts is anything but an anachronism. Since *National Farmers* and *Iowa Mutual* were decided, Congress has reasserted its strong policy of promoting development of and respect for tribal courts. In 1993, in the Indian Tribal Justice Act, 25 U.S.C. § 3601 *et seq.*, Congress declared that it had "through statutes, treaties, and the exercise of administrative authorities . . . recognized the self-determination, self-reliance, and inherent sovereignty of Indian tribes" (§ 3601(3)) and that "Indian tribes possess the inherent authority to establish their own form of government, including tribal justice systems" (§ 3601(4)). More specifically, it stated that "tribal justice systems are an essential part of tribal governments and serve as important forums for ensuring public health and safety and the political integrity of tribal governments" (§ 3601(5)), adding that "Congress and the Federal courts have repeatedly recognized tribal justice systems as the appropriate forums for the adjudication of disputes affecting personal and property rights" (§ 3601(6)). The congressional committees, fully aware that tribal courts decide federal as well as tribal issues, discussed with approval the decisions in *National Farmers* and *Iowa Mutual*. H.R. Conf. Rep. 383, 103d Cong., 1st Sess. 13 (1993); H.R. Rep. 205, 103d Cong., 1st Sess. 8-9 (1993); S. Rep. 88, 103d Cong., 1st Sess. 8 (1993); *see* Nat'l Mining Ass'n *Amicus* Br. 25 n.21.

This Court's decision in *Strate*, though centrally relied on by petitioners, did not alter the exhaustion requirement in any way. What the Court addressed in *Strate*—and ultimately rejected—was an argument that *National Farmers* and *Iowa Mutual* had actually expanded the *substantive* reach of tribal courts' jurisdiction over the activities of non-Indians on non-Indian fee lands. The Court concluded that those decisions had "enunciate[d] only an exhaustion requirement" (520 U.S. at 453) and had not changed the limits on " 'the inherent sovereign powers of an Indian tribe' " (*id.*) recognized in *Montana v. United States*, 450 U.S. 544 (1981). The Court reemphasized that "the civil authority of Indian tribes and their courts *with respect to non-Indian fee lands* generally 'do[es] not extend to the activities of nonmembers of the tribe.' " *Id.* (emphasis added). As the United States recognizes (U.S. Br. 11-13), therefore, *Strate* says nothing to curtail the jurisdiction of tribal courts in the critically different situation involving activities of non-Indians *on tribal land*.

Having confirmed *Montana*'s restriction on tribal authority over non-Indians on non-Indian fee lands, the Court then noted that this lack of authority obviated the need for tribal-court exhaustion in certain circumstances. In so doing, the Court directly relied on, and did not purport to alter, the three exceptions to exhaustion recognized in *National Farmers* and *Iowa Mutual*. *See* 520 U.S. at 460 n.14 (citing note 21 of *National Farmers* and 520 U.S. at 449 n.7 (discussing exceptions)). The Court simply stated: "*When . . . it is plain* that no federal grant provides for tribal governance of nonmembers' conduct *on land covered by Montana's main rule* [*i.e.*, non-Indian

fee lands], it will be equally evident that tribal courts lack adjudicatory authority over disputes arising from that conduct." *Id.* (emphasis added). In that situation, as in any other situation where it is "plain" that tribal courts lack jurisdiction, to require exhaustion would "serve no purpose other than delay." *Id.* This discussion in *Strate* thus stands for the unremarkable point that the limitations on tribal jurisdiction over non-Indians on non-Indian fee lands—set forth in *Montana* and confirmed in *Strate*—amount, where it is "plain" that they apply, to the sort of express jurisdictional prohibition already acknowledged as an exception to the usual exhaustion requirement.

That situation, of course, is not at all present here. Although petitioners are non-Indian companies, their mining activities took place on *Indian* land, over which the Navajo Nation retained sovereign control, rather than on land owned in fee by non-Indians or comparably alienated land like the state highways in *Strate*. Indeed, petitioners' arguments against exhaustion have never relied on any principle of federal Indian law like that recognized in *Montana*. To the contrary, if only Indian-law principles were at issue, the Navajo court's jurisdiction would be beyond question. This Court in *Montana*, before developing its "main rule" about "land owned in fee by nonmembers of the Tribe," sharply distinguished "land belonging to the Tribe or held by the United States in trust for the Tribe," stating that it "readily agree[d]" that the Tribe had jurisdiction over the latter areas. 450 U.S. at 557. In *Strate*, the Court quoted and reaffirmed that "unqualified recognition" of tribal authority over such tribal land. 520 U.S. at 454 n.8; *see id.* at 454 ("We 'can readily agree,' in accord with *Montana*, 450 U.S. at 557, that tribes retain considerable control over nonmember conduct on tribal land." (footnote omitted)). This case falls under that clear principle.

B. The Navajo Nation's courts are thus entitled to a full opportunity to decide their own jurisdiction over respondents' claims unless petitioners can establish both of the following: that the Price-Anderson Act contains an "express jurisdictional prohibition[]" on tribal-court adjudication of "public liability" claims and that respondents' claims are "patently" among those claims. Any looser standard—based on something less than clear divestiture of tribal-court jurisdiction clearly applicable to the particular case—would improperly demand resolution of the merits at this stage and thus be at odds with the very nature of the exhaustion requirement. Furthermore, it would be contrary to the admonition of this Court that because Indian tribes "retain[] all inherent attributes of sovereignty that have not been divested by the Federal Government, the proper inference from silence . . . is that the sovereign power . . . remains intact." *Iowa Mutual*, 480 U.S. at 18 (internal quotation marks omitted). This case, in fact, involves a federal-court challenge of the type that is most intrusive on tribal courts: a direct request to stop the tribal-court proceedings, as in *National Farmers*, not merely a request to allow concurrent federal and tribal proceedings, as in *Iowa Mutual*. *See* note 18, *supra*. The interference with tribal sovereignty sought by petitioners is therefore at its greatest, and the comity policies behind exhaustion at their strongest.

The Ninth Circuit decided only whether the Price-Anderson Act expressly bars tribal courts from hearing "public liability" claims, but its power to reach that issue is disputed. Accordingly, we first address the exhaustion question that all parties agree is before the Court (albeit undecided by the Ninth Circuit): whether respondents' claims so patently fall within the Price-Anderson Act that exhaustion is unnecessary. As we discuss below, they do not.

II. Respondents' Claims Do Not Patently Fall Within The Price-Anderson Act, And Exhaustion Would Serve The Purpose Of Developing A Record Necessary To A Proper Determination Of The Act's Applicability To The Tribal-Court Actions

A. Because petitioners' brief seems to suggest otherwise, it is important to emphasize that we are not contending that identical claims for certain nuclear-related injuries

might simultaneously arise under the Price-Anderson Act and yet continue to exist as tribal (or state) claims. It is undisputed that, if respondents' tribal-court claims are "public liability actions," the tribal courts must treat them as such—with whatever consequences for their jurisdiction over such claims that the Act may require (*see* Argument IV, *infra*). Instead, respondents contend that their particular claims in tribal court—because they involve mining activities and incidents not subject to any indemnification agreement—are not properly deemed to arise under the Act at all. To avoid exhaustion, petitioners must go beyond showing the contrary: they must show that the claims are so "patently" within the Price-Anderson Act that exhaustion is pointless. As we discuss below (pages 28-39, *infra*), they cannot do so.

The United States, however, seeks to sidestep the question entirely, contending that its characterization of the Price-Anderson Act as a "complete preemption regime[]" (U.S. Br. 15) means that the federal district court may, and indeed must, directly decide whether respondents' claims are within the scope of the Act.[19] But, to begin with, it is not at all clear what it is about the Price-Anderson Act that would make it into a "complete preemption regime." Unlike the classic "complete preemption" provisions (29 U.S.C. § 1132(a) (ERISA); 29 U.S.C. § 185 (collective bargaining agreements)), the Price-Anderson Act does not displace all of the substantive state-law standards governing conduct in the covered area; to the contrary, as the statute indicates, state-law standards must exist to supply the governing standards under the deemer clause itself. Likewise, under the clear holding of *Silkwood*, the Atomic Energy Act itself does not displace all regulation other than federal regulation, but

[19] The United States then suggests that the issue be left to the lower federal courts, rather than be decided by this Court. But as we discuss below, the error in the United States' theory means that it is not the proper role of the federal courts at all, but rather of the tribal courts, to decide in the first instance whether respondents' claims in fact come within the scope of the Act.

tolerates the indirect regulatory pressure exerted by tort law remedies. *See* note 2, *supra*. Furthermore, unlike the Outer Continental Shelf Lands Act (OCSLA), the statutory analogue cited by Congress (*see* note 12, *supra*; 43 U.S.C. § 1331(a)(1); *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 479-80 (1981)), no provision of the Price-Anderson Act declares federal regulatory jurisdiction to be exclusive. Finally, the Price-Anderson Act does not expressly create a cause of action: it contains no provision granting particular persons otherwise-absent authority to sue for prescribed relief.[20]

The Court need not resolve these matters, though, because, even if the Price-Anderson Act is thought to be a complete preemption regime, the decisive fact is that this characterization will not do what the United States says it does. As this Court held in *Gulf Offshore*, reviewing the congressionally cited statutory analogue, OCSLA, a provision effecting "complete preemption" of certain state-law claims does *not*, in and of itself, oust nonfederal forums of adjudicatory authority: those very claims can be litigated in the nonfederal forum. 453 U.S. at 477-84; *see also Livadas v. Bradshaw*, 512 U.S. 107, 122 (1994) (state courts may hear claims under completely preemptive 29 U.S.C. § 185). What a "complete preemption" provision does, instead, is to provide a basis for successfully invoking a separate *removal* provision. It is the *removal* provision that authorizes the federal court to decide whether the removed claim is within the sphere of the "complete preemption," and it is the *removal* provision

[20] Indeed, the Congress that first wrote Section 2210(n) specifically said that it was *not* creating a federal cause of action. S. Rep. 89-1605, at 9 (permitting "retention of State law with respect to the cause of action"). What Congress wrote in 1988 is different from a cause-of-action provision: it is a jurisdictional provision and a declaration, for jurisdictional purposes, that certain nonfederal causes of action shall be "deemed to arise" under the Act. The United States carefully avoids ever directly stating that the Price-Anderson Act actually creates a cause of action, making only one indirect reference along those lines in describing decisions of courts of appeals. U.S. Br. 18 n.10.

that, if it is accompanied by a provision like 28 U.S.C. § 1446(d), requires the nonfederal proceeding to stop when the jurisdiction of a federal court is invoked. It is only after a statutory provision for seeking removal is identified and invoked that the notion of complete preemption comes into play, determining whether the case may remain in federal court or must be remanded.[21]

What is lacking here is the requisite removal provision. As the United States necessarily concedes (U.S. Br. 22), the removal provision in Section 2210(n)(2), like the general federal-question removal statute, 28 U.S.C. § 1441, applies only where the original case is in "State court." There is nothing in the Act to indicate that Congress intended that term to cover tribal courts, and petitioners do not contend otherwise. Pet. Br. 23 n.36. Indeed, relying on the fact that Congress has provided definitions to expand the meaning of "state court" for removal purposes when it wished (*e.g.*, 28 U.S.C. § 1451; 48 U.S.C. § 864; *cf.* Sup. Ct. R. 47), the Tenth Circuit has held—with respect to the "federal officer" removal statute, 28 U.S.C. § 1442—that references to "state courts" do not include tribal courts unless so defined by Congress. *Becenti v. Vigil*, 902 F.2d 777 (10th Cir. 1990). The same principle naturally applies to 28 U.S.C. § 1441 and 42 U.S.C. § 2210(n)(2). *Cf.* 42 U.S.C. § 2023(c) (defining "State" for purposes of one section of Atomic Energy Act).

Although the United States (U.S. Br. 25) ultimately asks the Court to fashion a do-it-yourself removal provision, using suits filed under Section 1331 and federal-court injunctive power to force tribal-court plaintiffs to refile in federal court, the request is wholly improper: there is no

[21] Although the United States seeks to distinguish arguments about *complete* preemption from arguments about *ordinary* preemption (U.S. Br. 14-15), the fact is that a claim of either kind of preemption is enough to require a federal court, if its jurisdiction is invoked by a removal petition, to address the question whether it has jurisdiction over the case. The difference lies in the answer to the question: claims of ordinary preemption do not support federal jurisdiction, and the case is thus remanded to state court.

basis for the Court to create a right to removal that Congress itself has chosen not to create. More particularly, it would be inappropriate to assume that Congress, because it provided for removal from state courts, would necessarily have wanted removal from tribal courts as well. For example, after losing *Becenti v. Vigil, supra,* the Department of Justice—in conjunction with its effort to overturn the decision of this Court in *International Primate Protection League v. Administrators of Tulane Education Fund,* 500 U.S. 72 (1991), to allow removal of cases against federal agencies as well as officers—asked Congress to allow removal from tribal courts.[22] But, while Congress did enact the proposal to overturn *Primate Protection League* (Federal Courts Improvement Act of 1996, Pub. L. No. 104-317, § 206, 110 Stat. 3850), it did *not* enact the Government's proposal to provide for removal from tribal courts. This refusal to authorize removal is entirely consistent with the fact that, while Congress has considered provisions for removal from tribal court in different contexts,[23] and cases have often been heard in tribal court that would be removable if filed in state court, Congress so far has chosen not to enact any removal statute applicable to tribal courts.

[22] The Congressional Record reports receipt in each House of letters from the Assistant Attorney General, Legislative Affairs, making this two-part proposal. *See* 140 Cong. Rec. S3444 (Mar. 22, 1994) (reporting Executive Communication 2392); **140 Cong. Rec.** H155 (Feb. 1, 1994) (same). The letters explained, and included a section-by-section analysis that likewise explained, that the purpose of the attached bills was to "reverse the adverse effects of the decision of *Becenti v. Vigil*, 902 F.2d 777, 780 (10th Cir. 1990), which prevents suits against federal officers and agencies that are filed in tribal courts from being removed to federal district court."

[23] *See, e.g.*, 139 Cong. Rec. H7012 (Sept. 27, 1993) (proposed version of Catawba Indian Tribe of South Carolina Claims Settlement Act, 25 U.S.C. § 941 *et seq.*) (H.R. 2399, §§ 11.2.2, 12.1.2.2); 139 Cong. Rec. S8096 (June 24, 1993) (S. 1156, §§ 11(b)(2), 12(a)(3)(B)) (same); 141 Cong. Rec. S2831 (1995) (proposed Native American Financial Services Organization Act, S. 436, § 201(d)(3)); 143 Cong. Rec. S5135 (1997) (S. 818, § 101(d)(3)) (same).

Finally, it is important to note that the relief sought by petitioners, and the issues at stake before the federal court, are not the same as those presented upon the filing of a removal petition. In that context, the federal court is asked, first, to decide whether or not *it* has jurisdiction —a question that does not turn on whether the state court (from which removal is sought) had jurisdiction in the first place—and, second, to exercise any jurisdiction that it does have. Here, however, petitioners are not asking the federal court either to decide, or to exercise, its own jurisdiction over the claims but urging it to determine that another court, *i.e.*, the tribal court, lacks jurisdiction over them and then to order that prosecution of the claims be halted. That kind of extraordinary federal interference should rest on no less clear a congressional authorization than is required to invoke the less intrusive, but still carefully limited, procedure for removal. *See Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 108-09 (1941) (removal provisions are strictly construed); *see also Rivet v. Regions Bank of Louisiana*, 118 S. Ct. 921 (1998).

B. Turning to the proper issue under *National Farmers* and *Iowa Mutual*—whether the claims brought by respondents are clearly within the ambit of the Price-Anderson Act—the short answer is that they are not. Although the scope of the Atomic Energy Act is concededly broad, and although the term "public liability action" in the Price-Anderson Act is broadly defined, it would be utterly anomalous to hold that the deeming provision of the Price-Anderson Act is applicable even where the claims are based on activities relating to the *mining* of uranium and where the relevant incidents were not subject to any indemnification agreement. Indeed, the effect of petitioners' theory is to say that a plaintiff may be deemed to bring a "public liability action" even though none of the defendants is within the class of persons "liable for public liability." 42 U.S.C. § 2014(t). For Congress to create federal jurisdiction over such claims, moreover, would raise

the most serious questions of its power to do so without exceeding the limitations of Article III.

1. Although petitioners speak of "[c]omprehensive federal control over nuclear-related activities" and "the pervasive nature of [Atomic Energy Act] regulation" (Pet. Br. 9, 10), their brief conspicuously omits any discussion about regulation under the Atomic Energy Act of the particular activity at issue in the tribal-court suits: petitioners' *mining* of uranium. That omission is significant: for all of the wide-ranging authority granted by the Atomic Energy Act, the Atomic Energy Commission and its successors (Nuclear Regulatory Commission and Department of Energy) have long disclaimed interest in, and authority to regulate, such uranium mines. Thus, the 1961 report of the federal-state conference convened to review health hazards in uranium mines, discussed at pages 5-6, *supra*, pointed out that the Commission's "authority is not regarded as extending to control of radiation hazards within uranium mines," stating instead that "[c]ontrol of these hazards was viewed by the conferees as a primary responsibility of the States." Quoted in *Radiation Exposure of Uranium Miners, supra*, at 909, 901; *see Begay v. United States*, 591 F. Supp. at 1000-02. In 1967, AEC Commissioner James Ramey reaffirmed in testimony to Congress that "since AEC's authority to regulate source material is limited to material after removal from its place of deposit, mining of uranium is not covered," and he went on to declare that the "AEC from the outset of its procurement activities proceeded on the principle that regulation of mine safety was traditionally a responsibility of the individual States." *Id.* at 159.[24]

[24] Commissioner Ramey pointed out that (contrary to the picture of exclusive federal regulation suggested by petitioners) a number of the western States had in fact adopted and enforced various standards with respect to mining safety. *Id.*; *see id.* at 172-73, 178 (describing various States' standards). *See also Health Impact of Low-Level Radiation, 1979*, Joint Hearing before the Subcomm. on Health and Scientific Research of Senate Committees on Labor and Human Resources and Judiciary, 96th Cong., 1st Sess. 29 (1979)

More recent government testimony confirms that uranium mining like that conducted by petitioners is outside the Nuclear Regulatory Commission's authority.[25]

Given this longstanding hands-off position, it stretches reason to suppose that Congress intended to sweep claims involving wrongful operation and abandonment of uranium mines within the ambit of the Price-Anderson Act. After all, the Price-Anderson Act provisions are part of the Atomic Energy Act, and throughout this litigation petitioners have steadfastly treated the federal interests behind the Price-Anderson Act as inextricably linked to the special regulatory interests behind the Atomic Energy Act. *See* Pet. Br. 9-23. Indeed, the logical linkage is apparent: it is the tight regulation of safety under the Atomic Energy Act that was expected to minimize the possibility of accidents and thus to provide the predicate for the assumption of indemnification liability. *See* note 8, *supra*. Thus, although the Price-Anderson Act speaks of liability arising out of a "nuclear incident," and the definition of "nuclear incident" includes injuries arising out of "source, special nuclear, or byproduct material," it is logical to read that definition, in context, as applicable only to the extent that those materials are subject to the Atomic Energy Act (in which that definition appears). 42 U.S.C. § 2014(q).

(1962 Public Health Service document); Note, *Unfinished Business*, *supra*, at note 3.

25 In 1993, the federal Environmental Protection Agency told Congress that "the NRC has no regulatory authority over uranium mines, except the aboveground activities of solution mines [irrelevant here]." *Clean-Up of Abandoned Uranium Mines & Mine Waste on the Navajo Reservation*, Hearing before Subcomms. on Oversight and Investigations and Native American Affairs, House Comm. on Natural Resources, 103d Cong., 1st Sess. 10 (Nov. 4, 1993). *See also id.* at 33 (testimony of R. Pat Whitfield, U.S. Dep't of Energy) ("Although the Department has authority to remediate uranium mill processing sites on Navajo lands under [the 1978 Uranium Mill Tailings law], it has limited authority to address uranium mines. Only one mine on Navajo lands has fallen under the responsibility of the DOE, through the Uranium Leasing Program, and remediation of this site is already completed").

Petitioners face a comparably daunting problem with the substantive provisions of the Price-Anderson Act itself. Although the Act plainly is intended to be comprehensive as far as it goes, it seems highly implausible to think that, where no indemnification (or financial protection) requirements apply to an accident, Congress nevertheless intended that a claim based on that accident be deemed a "public liability" claim arising under the Act. Most pointedly, a suit "asserting public liability" (*i.e.*, a "public liability action") is naturally construed to have, as defendants, persons that are "liable for public liability." Yet, as the United States acknowledges, the longstanding interpretation of the "person indemnified" definition in the Act makes clear that the class of persons "liable for public liability" *does not include* persons liable for nuclear incidents "in contexts in which *no one* has an indemnification agreement with the government." U.S. Br. 29 n.16.

The relevant provision for these purposes is Section 2014(t) of the Act, which defines the phrase "person indemnified" to include, first of all, "the person with whom an indemnity agreement is executed or who is required to maintain financial protection" and, then, "any other person who may be *liable for public liability*" (emphasis added). This phrase thus encompasses every person liable for public liability, yet, as the United States expressly acknowledges (U.S. Br. 29 n.16), a person is not within the scope of Section 2014(t) *unless* someone responsible for the particular nuclear material is subject to an indemnification agreement. Indeed, the decision of this Court in *Silkwood* makes the same point. In stating that "the Price-Anderson Act [did] not apply" to the facts of that case, the Court in *Silkwood* observed that Section 2014(t), with its inclusive definition of all persons "liable for public liability," was "not relevant." 464 U.S. at 251 & n.12. That provision would obviously be relevant to a suit asserting injury from exposure to nuclear material unless (as was the case in *Silkwood*) the defendants were not liable for "public liability" because no indemnification agreement was applicable to the nuclear material at issue.

This limit on the range of persons "liable for public liability" necessarily contradicts petitioners' insistence that the term "public liability" must apply to *all* liability arising out of a nuclear incident, regardless of whether an indemnification agreement applies. Either the term "public liability" inherently carries the implied limitation to liability arising out of incidents involving some indemnity agreement, or it is proper (and presumably was understood by Congress to be proper) to read a crucial, seemingly unqualified term in the Act as narrowed by context.[26] Either way, however, the narrower view of those persons "liable for public liability" reflects the repeatedly expressed understanding that Congress, rather than extending coverage of the Act to *any* person facing *any* liability for *any* nuclear incident, even in the absence of an indemnity agreement, simply intended to provide an unusual form of "umbrella coverage" to channel liability to a person *having* an indemnification agreement, including liability incurred by a third party (like an airplane pilot who crashes into an indemnified power plant).[27] It should follow, therefore,

---

[26] In 1966, AEC Commissioner James Ramey explained to Congress that "public liability" was "a legal term of art." *1966 Hearing* at 3.

[27] *See Report by the Comptroller General*, in *Price-Anderson Act*, Hearing before the Subcomm. on Energy Research and Production of the House Comm. on Science and Technology, 97th Cong., 1st Sess. 95, 100-01 (1981); *Reauthorization of the Price-Anderson Act*, Hearing before the Subcomm. on Nuclear Regulation of the Senate Comm. on Environment and Public Works, 99th Cong., 1st Sess. 49 (1986) (*"1986 Hearing"*) (describing "the omnibus insuring provision of the Act, 42 U.S.C. § 2014(t), implemented through the 'Facility Form' insurance policy specified at 10 C.F.R. § 140.91 Appendix A"); H.R. Rep. 100-104, Part 1, at 5 (describing " 'omnibus coverage' " feature of Act); S. Rep. 100-70, at 52 (NRC testimony that Section 2014(t) "made no sense without an indemnity agreement"); *see also* S. Rep. 85-296, at 9-10, 16-19 (citing airplane example and explaining that the licensee's indemnity agreement and private insurance policy will cover "any other person who may be liable for a nuclear incident"); H.R. Rep. 85-435, at 9-10, 16-19 (identical).

that a "public liability action" is similarly limited to suits against persons that are "liable for public liability."[28]

The implied limitation of "public liability" (with its tie to the phrase "nuclear incident") is further reflected in other statements of this Court. For example, the Court said in *Duke Power* that "the Act limited the aggregate liability for a single nuclear incident to $500 million plus the amount of liability insurance available on the private market." 438 U.S. at 64-65. The Court likewise said in *Silkwood*, without qualification, that "the resulting $560 million [of Government indemnity and private insurance] would be the limit of liability for any one nuclear incident." 464 U.S. at 251. But, because "public liability" for a "nuclear incident" is not limited unless there is an indemnity agreement, those statements, to be accurate, must recognize that the terms of the Act are to be read in context as applying only when such an indemnity agreement exists.[29] In the absence of an indemnity agreement, the contractors and licensees are simply not "covered by the Price-Anderson Act." *Report by the Comptroller General, supra*, at 101; 134 Cong. Rec. 19812 (Aug. 2, 1988) (Rep. Udall, sponsor of Amendments, pointing out that

---

[28] Congress left Section 2014(t) and its construction in *Silkwood* undisturbed when, with *Silkwood* clearly in mind, Congress revisited the Act in 1988. Importantly, the Three Mile Island incident that led to enactment of the relevant 1988 provisions—and all of petitioners' court-of-appeals authorities—involved accidents covered by indemnification agreements. Congress added a new, partial limit on punitive damages (§ 2210(s)), but it generally "did not intend to change the result the Supreme Court had reached in *Silkwood*." *In re TMI*, 67 F.3d 1119, 1125 (3d Cir. 1995), *cert. denied*, 517 U.S. 1163 (1996) (§ 2210(s) limits only government payment of punitive damages); *see 1998 NRC Report*, at 15-16.

[29] *See also In re TMI Litigation Cases Consolidated II*, 940 F.2d 832, 852 (3d Cir. 1991), *cert. denied*, 503 U.S. 906 (1992) ("any entity exposed to potential liability for activity resulting in a nuclear incident, even if it were not a direct participant in the activity, was entitled to indemnification"; thus tying "nuclear incident"—a term whose meaning has not changed (*id.* at 837 n.3)—to indemnification).

"the key to Price-Anderson coverage—the authority . . . to enter into indemnification agreements with their licensees and contractors—[had] expired" in 1987 and noting absence of such coverage for many nuclear activities).[30]

Other textual evidence supports this understanding as well. For example, Section 2014(hh) states that certain cases are deemed to "aris[e] under Section 2210." But this language is most naturally read to refer to the *substantive* provisions of Section 2210 (because cases do not "arise under" jurisdictional provisions), and the phrasing would be very peculiar if the Section 2210 substantive provisions were inapplicable to the claim, as they would be in the absence of indemnity (or financial protection).[31] Relatedly, the jurisdictional subsection, 2210(n)(2), seems to contemplate that the "Commission, or the Secretary, as appropriate," can always intervene in a "public liability action" (*see* Pet. Br. 23 n.36), yet that intervention right suggests the presence of indemnification creating the particular federal government interest in the case. Moreover, the inclusion of an "extraordinary nuclear occurrence" in the definition of "nuclear incident" (42 U.S.C. § 2014(q)) suggests a limitation to indemnified conduct: the narrower,

30 *See* Office of General Counsel, U.S. Dep't of Energy, Notice of Inquiry Concerning Preparation of Report to Congress on the Price-Anderson Act, 62 Fed. Reg. 68272, 68274 n.19 (Dec. 31, 1997) (noting that Commission did not provide for "Price-Anderson coverage" except for reactors); *id.* at 68273 n.13 (Department of Energy discretion prior to 1988).

31 The deemer clause serves an important function in cases covered by indemnification agreements. The substantive provisions of Section 2210 typically would involve matters (such as who pays and various defenses) that do not form part of the *plaintiff*'s case and, therefore, without a special statutory provision like the deemer clause, would not ordinarily support "arising under" jurisdiction under the usual test. *See, e.g., Merrell Dow Pharmaceuticals Inc. v. Thompson*, 478 U.S. 804, 808 (1986) (under the "well-pleaded complaint" rule "[a] defense that raises a federal question is inadequate to confer federal jurisdiction"); *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1 (1983). The deemer clause solves that problem.

included term expressly contemplates such a limitation, and the distinguishing factor seems to be only the degree of harm, not the applicability of indemnification. *See Gilberg v. Stepan Co.*, 24 F. Supp. 2d 325 (magistrate judge decision), *aff'd*, Letter Order and Opinion (D.N.J. Dec. 14, 1998).[32]

A contrary reading—that the deemer and jurisdictional provisions of the Price-Anderson Act are *not* limited to indemnified activities covered by the substantive provisions of the Act—would also be at odds with basic statutory policy. It is unnatural to think that, when no substantive interest is present, Congress would authorize removal of litigation to federal court (and subsequent consolidation), even for individualized suits like respondents'. Various non-nuclear torts easily could give rise to quite similar appeals for such litigation-management measures, yet Congress has not provided for federal-court jurisdiction over or consolidation of such litigation. Where Congress (and its agency delegates) have not regarded a particular activity as warranting the special industry-encouraging *substantive* treatment provided by the Price-Anderson Act, there is little reason to think that Congress nonetheless contemplated extension of special jurisdictional provisions to that activity. Indeed, both in 1966, when the jurisdic-

32 An "extraordinary nuclear occurrence" is defined to mean "any event causing a discharge or dispersal" of certain nuclear materials or radiation "offsite," which is, in turn, specifically defined to "mean[] away from 'the location' or 'the contract location' as defined in the applicable [NRC] or the Secretary of Energy, as appropriate, indemnity agreement, entered into pursuant to section 2210." § 2014(j). As petitioners appear to recognize (Pet. Br. 18 n.22), an indemnity agreement is thus required. It is implausible (even if linguistically possible) that the broader class of nuclear incidents is not likewise so limited. The definition of "extraordinary nuclear occurrence" and the governing regulations (10 C.F.R. §§ 140 .81-.85) both simply presuppose, without calling any attention to, the required indemnity agreement; both indicate that it is only the level and dispersion of damage that distinguishes the special subclass of nuclear accidents as "extraordinary."

tional provision was first enacted, and in 1988, when it was amended to encompass smaller accidents like the (indemnified) Three Mile Island incident, the legislative history relies on the funding provisions to explain the jurisdictional provision. *See* S. Rep. 89-1605, at 8; *1986 Hearing* at 32; S. Rep. 218, 100th Cong., 1st Sess. 13 (1987); H.R. Rep. 100-104, Part 1, at 18. There is no indication that Congress meant to extend coverage to accidents resulting from activities that were altogether outside the substantive scope of the Act.

2. The Article III questions faced by Congress in enacting the jurisdictional provisions of the Price-Anderson Act make it even less likely that it intended to confer federal-court jurisdiction over cases involving neither substantive federal-law issues under the Price-Anderson Act nor substantive federal standards under the Atomic Energy Act. The constitutional difficulties of assigning federal-court jurisdiction over an essentially nonfederal case have been recognized by Congress from the outset. Accordingly, when it first created federal-court jurisdiction over certain claims (arising from an extraordinary nuclear occurrence) in 1966, Congress allayed its constitutional concerns by pointing to the "substantive Federal tort law" created by the waiver-of-issues provision applicable to covered claims (*1966 Hearing* at 37 (AEC General Counsel Hennessy)) and to "the provision made for their satisfaction" by the substantive indemnity and financial-protection provisions of the Price-Anderson Act (*1966 Hearing* at 81 (Professor Cavers)). *See also* note 10, *supra*. From the start, therefore, Congress linked the notion of federal jurisdiction to substantive matters addressed in the Act.

The same link between substance and jurisdiction is suggested by the legislative history leading to the 1988 Amendments. In the key congressional hearing devoted to the jurisdictional amendment, the Committee asked repeatedly about the Article III issue, and in the only apparent substantial response, the basis for the jurisdiction-creating power was, once again, seemingly tied to the substantive provisions of the Price-Anderson Act. *See 1986 Hearing* at 91. Based on the general principle that Congress has "power to draw controversies which may implicate construction or effectuation of its enactment or policies into a federal forum," the testimony pointed to the specific policies of the Price-Anderson Act itself, as applied to the classic indemnified situation of a nuclear power plant: "Congress has chosen in the Price-Anderson Act to exercise its power in the field of claims arising in the context of a *nuclear reactor* accident. In such a context, and without the need to enact substantive rules declaring the standards for recovery, Congress undoubtedly can draw such litigation into federal courts . . . [even though] liability issues, for example, would be governed (by Congressional choice) by state law." *Id.* (emphasis added). There was no discussion of possible federal jurisdiction over cases where, for lack of indemnification, the Price-Anderson Act's substantive provisions did not apply (or of cases where no Atomic Energy Act standards applied).

This evidence of congressional concern about compliance with Article III reflects, and is reinforced by, the familiar principle that a statute should be construed, if possible, to avoid a result that "raises serious constitutional doubt." *Mesa v. California*, 489 U.S. 121, 136-37 (1989). This Court has held that "pure jurisdictional statutes which seek 'to do nothing more than grant jurisdiction over a particular class of cases' cannot support Art. III 'arising under' jurisdiction." *Id.* at 136 (quoting *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 496 (1983)). In *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417 (1995), five Justices recognized that a difficult constitutional question would be raised by an assignment to the federal courts of "jurisdiction over a claim that does not implicate federal law in any way." *Id.* at 441 (Souter, J., dissenting, joined by Rehnquist, C.J., and Scalia, Thomas, JJ.); *see id.* at 437-38 (O'Connor, J., concurring in part and concurring in the judgment).

Application of the deemer clause where the substantive Price-Anderson provisions are inapplicable, and even worse where no federal substantive standards apply, would seem to make it nothing more than a "pure jurisdictional statute." *Mesa*, 489 U.S. at 136. Section 2014(hh) uses the language only of jurisdiction, "deem[ing]" certain actions to be actions "arising under section 2210," which itself does not provide a cause of action. Thus, although petitioners vigorously insist otherwise (Pet. Br. 17-18), any cause of action in the Act must be of the disfavored "implied" variety, because nothing in the Act sets forth a "cause of action" at all, *i.e.*, authorizes persons to sue and to recover when they are not already authorized to do so by other sources of law. In any event, it is hardly clear that Congress can avoid the constitutional constraints reflected in *Mesa* by creating a bare cause of action where no substantive federal standards and no other concrete federal interests (*e.g.*, administration of federal lands) are present.[33] Federal jurisdiction in the absence of indemnification or Atomic Energy Act safety standards appears to require just the sort of broad "protective jurisdiction" theory of Article III power that this Court has declined to embrace. *See Mesa*, 489 U.S. at 137.

C. The record of the tribal-court proceedings will provide a substantial basis on which to address these questions. Those proceedings will identify, among other things, what precise conduct of petitioners and what precise materials (perhaps not limited to source materials) caused respondents' injuries; whether the conduct causing harm (*e.g.*, leaving uranium mines exposed to water collection and public access) was within the safety-regulation regime of the Atomic Energy Act at the relevant times; whether

[33] Indeed, this Court "has sometimes found that formally federal causes of action were not properly brought under federal-question jurisdiction because of the overwhelming predominance of state-law issues." *Merrell Dow*, 478 U.S. at 814 n.12, citing and discussing *Shulthis v. McDougal*, 225 U.S. 561, 569-70 (1912); *Shoshone Mining Co. v. Rutter*, 177 U.S. 505, 507 (1900); *see* Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U. L. Rev. 543, 569-70 (1985).

any Atomic Energy Act safety standards in fact addressed the conduct at issue; whether other federal standards addressed the conduct; and whether the conduct was covered by any indemnification agreements under the Price-Anderson Act (*compare* Pet. 10 n.9 *with* Pet. Br. 13 n.12). After the tribal-court proceedings, therefore, the federal court presented with petitioners' contentions will have a fuller, clearer, and more definitive picture of just what respondents' claims are and, as important, what law might be applicable to them. In particular, the federal court will know whether the litigation involves any substantive federal-law issues under the Atomic Energy Act or the Price-Anderson Act.

Those matters are material to a proper analysis of the scope of the Price-Anderson Act. This Court has rejected efforts to construe statutory words, like "public liability" and "nuclear incident," in isolation. To the contrary, both as a matter of regular practice and express doctrine, the Court has repeatedly made clear that "the meaning of statutory language, plain or not, depends on context." *King v. St. Vincent's Hospital*, 502 U.S. 215, 221 (1991); *see Smith v. United States*, 508 U.S. 223, 229 (1993) ("Language, of course, cannot be interpreted apart from context."); *Massachusetts v. Morash*, 490 U.S. 107, 114-15 (1989).[34] The United States itself, in urging judicial recognition of a *de facto* extension of removal jurisdiction, relies not on any language of the Price-Anderson Act but, rather, on "the structure and purposes of the Act." U.S. Br. 24. The matters to be developed in the tribal court will affect the full consideration and proper resolution of the language, structure, and purposes of the Act.

[34] *See also, e.g., John Hancock Mutual Life Ins. Co. v. Harris Trust & Sav. Bank*, 510 U.S. 86, 95 (1993); *Shell Oil Co. v. Iowa Dep't of Revenue*, 488 U.S. 19, 26 (1988); *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 51 (1987); *Kelly v. Robinson*, 479 U.S. 36, 43 (1986); *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270, 285 (1956) (" 'In expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy' ") (quoting *United States v. Boisdoré's Heirs*, 7 How. (49 U.S.) 113, 122 (1849)).

III. The Cross-Appeal Rule Is Not An Absolute Bar That Precluded The Court Of Appeals From Reviewing The Preliminary Injunctions Against Respondents

Having discussed at length the issue that the Ninth Circuit did not reach, we nonetheless think that this Court can affirm the judgment below on the basis of the issue that it did reach: the propriety of the (unappealed) orders entered by the district court barring respondents from "seek[ing] relief based upon the Price-Anderson Act in tribal court." J.A. 71a, 73a. Although it was highly unusual for the court of appeals to consider the issue *sua sponte*, this case presented highly unusual circumstances. The balance of interests bearing on the Ninth Circuit's decision to reach the orders against respondents is, for exceptional reasons, completely one-sided.

On one side of the balance, the critical procedural facts are that the orders were *preliminary* injunctions and the appeals by petitioners were interlocutory ones. Respondents therefore were under no obligation to take an interlocutory appeal, which is purely "permissive," but could await eventual entry of final judgments under Fed. R. Civ. P. 58 and pursue their appeals, without loss of rights, at that time. *See* 16 C. Wright, A. Miller, & E. Cooper, *Federal Practice and Procedure* § 3921, at 20 (1996) (citing and quoting many decisions). Accordingly, respondents forfeited nothing and committed no "default" (U.S. Br. 20), and petitioners had no interest whatever in finality or repose based on the orders. The Ninth Circuit's consideration of the district court's bar on any tribal-court proceedings conducted under the Price-Anderson Act was, at worst, premature, for the issue will, if necessary, be presented to the Ninth Circuit on review of the final judgments.

On the other side of the balance, consideration of the issue by the Ninth Circuit enabled the court to minimize intrusions on tribal courts and show the respect for tribal self-government long promoted by Congress. Moreover, the legal analysis in this case demonstrates that the issue

decided by the Ninth Circuit is closely related to the issue that it was asked to decide by petitioners—whether respondents' claims patently come within the Price-Anderson Act. In addition, the ultimate decision that exhaustion was required in any event avoided the more difficult questions, both statutory and constitutional, implicated by petitioners' appeal. For these reasons, all of the policies relevant to the cross-appeal requirement support the court of appeals' decision to reach the issue in this case.

The question, then, is whether the cross-appeal rule is so rigid that it bars consideration of unappealed issues, regardless of the circumstances. We think that it is not. In the first place, the experience of the lower courts, where narrow exceptions have been recognized over the years, supports treatment of the rule as strict but not absolutely rigid.[35] These precedents reflect practical judicial judgments supporting narrow exceptions to, or modest flexibility in, the cross-appeal rule. *See* 15A C. Wright, A. Miller, & E. Cooper, *Federal Practice and Procedure* § 3904 (1992). Equally important, the very existence of these authorities shows that the cross-appeal rule can be less than utterly rigid without opening the floodgates

---

[35] *See, e.g., Bryant v. Technical Research Co.*, 654 F.2d 1337, 1341 (9th Cir. 1981) (joined by Kennedy, J.) ("a protective or cross-appeal is only the 'proper procedure,' not a jurisdictional prerequisite once an initial appeal has been filed"); *Pan-Pacific and Low Ball Cable Television Co. v. Pacific Union Co.*, 987 F.2d 594, 596 (9th Cir. 1993) (reaffirming *Bryant* ruling); *Freeman v. B&B Associates*, 790 F.2d 145, 151 (D.C. Cir. 1986); *Spann v. Colonial Village, Inc.*, 899 F.2d 24, 32 (D.C. Cir. 1990) (R.B. Ginsburg, J.), *cert. denied*, 498 U.S. 980 (1990); *Champagne v. Schlesinger*, 506 F.2d 979, 982 (7th Cir. 1974) (joined by Stevens, J.); *Robicheaux v. Radcliff Material, Inc.*, 697 F.2d 662, 668 (5th Cir. 1983); *United States v. Tabor Court Realty Corp.*, 943 F.2d 335, 342-45 (3d Cir. 1991), *cert. denied*, 502 U.S. 1093 (1992); *United States v. Bohn*, 959 F.2d 389, 392-94 (2d Cir. 1992) (allowing Government to increase an unappealed part of a criminal sentence where an appealed part was reduced on appeal).

and defeating its important role in narrowing issues in litigation.[36]

The precedent of this Court, likewise, does not demand unyielding application of the cross-appeal rule. The principal authorities cited by petitioners and the Government, *Northwest Airlines, Inc. v. County of Kent*, 510 U.S. 355, 364 (1994), and *Morley Constr. Co. v. Maryland Casualty Co.*, 300 U.S. 185, 191 (1937), do not say that the rule is absolute or "jurisdictional," although in *Morley* the petitioner so characterized the point (*see* 81 L. Ed. at 594) and the Court found lack of "power" to reach an issue in the circumstances presented (300 U.S. at 187). Moreover, this Court specifically concluded otherwise in *Langnes v. Green*, 282 U.S. 531 (1931), which was cited with evident approval in *Morley* itself (300 U.S. at 191), and which has continued to be relied on (*see United States v. New York Telephone Co.*, 434 U.S. 159, 166 n.8 (1977) (cited in *Northwest Airlines*)). The Court in *Langnes*, after pointing to various decisions recognizing broad appellate authority over the lower court judgment once one party seeks review (282 U.S. at 535-37), characterized the decisions applying the cross-appeal rule as resting only "upon the theory that the court is not *bound* to consider objections to the decree urged by respondent, in the absence of cross-petition for certiorari" (*id.* at 537). The Court then explained that the cross-appeal decisions "simply announce a rule of practice which generally has been followed; but none of them deny the *power* of the court to review objections urged by respondent, although

---

[36] The rule is thus much like the strict rule of this Court that petitioners cannot raise a question that is outside the questions presented (Sup. Ct. R. 14.1(a)), which serves its important purposes even though it is not treated "as a jurisdictional bar" (*Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 246 n.12 (1981)) and the Court occasionally makes exceptions (*see* R. Stern, E. Gressman, S. Shapiro, & K. Geller, *Supreme Court Practice* § 6.25(g), at 340-41 (7th ed. 1993)).

he has not applied for certiorari, if the court deems there is good reason to do so." 282 U.S. at 538.[37]

The decision in *Torres v. Oakland Scavenger Co.*, 487 U.S. 312 (1988)—whose result has since been overturned by amendment (*see* 1993 Advisory Committee Note, Fed. R. App. P. 3)—does not demand a contrary conclusion. In treating as "jurisdictional" (487 U.S. at 317, 318) the requirement of Fed. R. App. P. 3 that a notice of appeal "shall specify the party or parties taking the appeal," the Court reasoned that the mandatory nature of the time limits for appeal (*see* Fed. R. App. P. 4; 28 U.S.C. § 2107) would otherwise be vitiated (487 U.S. at 315). Even so, the Court found a particular notice of appeal—from the "final" judgment at issue in *Torres* (487 U.S. at 313)—to be insufficient only after concluding that the notice failed to provide "the functional equivalent of what the rule requires," considering the "purpose of the specificity requirement." 487 U.S. at 317, 318.

In the present case, petitioners have not identified any statute or formally promulgated rule whose terms the decision of the Ninth Circuit would flout. The core rationale of *Torres*, moreover, has no application here: the interest in finality and repose that was protected by the strict application of Rule 3 in *Torres* is wholly missing in this case.[38] The decision in *Torres* itself indicates that,

---

[37] *See also Bowen v. United States Postal Service*, 459 U.S. 212, 217-18 n.7 (1983) (plaintiff-appellee was not required to take a cross-appeal in order to have appeals court increase the district-court judgment against the defendant-employer after reduction of the judgment against the appellant, defendant-union); *id.* at 244-45 (White, J., joined by Marshall, Blackmun, JJ., dissenting in part).

[38] That is because, as noted, the appellate process at issue here was interlocutory. In addition, Mr. Torres, by failing to be an appellant (and not otherwise participating in the court of appeals), may not have been a party in the court of appeals at all. There is no Rule of Appellate Procedure treating all nonappellants as appellees. *Compare* Sup. Ct. R. 12.6 (treating as respondents any non-petitioning parties below, but also stating that "[p]arties who

even where a "rule" is treated as "jurisdictional," its proper application is linked to the purposes behind it. Because no textual violation is at issue here, and the function of the cross-appeal rule is not advanced by invoking it to bar relief, the strict reading of Rule 3 in *Torres* does not stand in the way of recognizing the otherwise-sensible exception for the limited circumstances presented here.

IV. The Price-Anderson Act Does Not Expressly Prohibit Tribal-Court Jurisdiction To Adjudicate Public Liability Claims

A. The Ninth Circuit, in reviewing the order barring respondents from pursuing claims "based upon the Price-Anderson Act in tribal court" (J.A. 71a, 73a), correctly decided that the Act did not contain a patent jurisdictional prohibition against tribal-court adjudication of such claims. *See National Farmers*, 471 U.S. at 856 n.21; *Iowa Mutual*, 480 U.S. at 19 n.12. El Paso itself acknowledged in the district court "the absence of a clear cut jurisdictional mandate within the statute" (Reply In Support Of Application for Preliminary Injunction, 1 Ct. App. Excerpts of Record CR 12 at 5), and the Government has effectively acknowledged the same thing in recommending that Congress, in reconsidering the Price-Anderson Act, now decide the issue (*see* note 7, *supra*). In fact, it is plain on the face of the statute that neither the deeming provision (§ 2014(hh)) nor the jurisdictional provision (§ 2210(n)(2)) constitutes an express prohibition of jurisdiction in tribal courts.

The normal rule, of course, is that federal claims are not within the exclusive jurisdiction of the federal courts. *See Tafflin v. Levitt*, 493 U.S. 455, 459-60 (1990). The deeming provision deems certain claims to arise under Section 2210, but it does not state that tribal courts, or

---

file no document will not qualify for any relief from this Court"). Respondents here, by contrast, were parties in the Ninth Circuit—they were the appellees who were directly adverse to the appealing petitioners—regardless of whether they filed an appeal.

any other courts, lack jurisdiction over them. Furthermore, Section 2210 makes plain that federal jurisdiction is not exclusive: cases covered by the Act may be filed and remain in state court, subject only to the opportunity for removal. S. Rep. 89-1605, at 28 (removal is permissive). This lack of exclusivity is not unusual: this Court has expressly held that, under the OCSLA (which a congressional committee invoked as a precedent for the 1988 provisions), federal courts do not have exclusive adjudicatory authority over claims under that Act despite exclusive federal regulatory authority in the area. *Gulf Offshore*, 453 U.S. at 477-84. And, as the United States explains (U.S. Br. 12-13), where there is no issue of lack of territorial jurisdiction over non-Indian fee lands, as in *Strate*, a defendant cannot strip the tribal courts of adjudicatory authority over its conduct on Indian land merely by asserting, as a defense, that federal law preempts regulatory authority over the conduct.

A removal provision applicable to tribal courts presumably would, if accompanied by a provision like 28 U.S.C. § 1446(d) (directing state proceedings to cease upon filing of a removal petition), constitute a patent jurisdictional bar to the exercise of tribal-court jurisdiction (until any remand from a federal court). But that theory cannot help petitioners, who never sought removal and who, indeed, appear to agree (Pet. Br. 23 n.36) that the Act does not authorize removal from tribal courts. As noted at page 27, *supra*, that silence reflects Congress's general practice of *not* providing for removal from tribal courts.

Nor can the lack of a removal provision be turned upside down to imply that Congress meant to deprive tribal courts of jurisdiction in the first place. Even outside the tribal-court context, the conclusion does not follow from the premise. Notwithstanding a strong interest in access to a federal forum, Congress may reasonably decide to leave particular cases for resolution in state or tribal courts. In *International Primate Protection League*,

for example, this Court determined that Congress had not provided for the removal of suits against federal agencies, without any suggestion that, as a result, state courts should be treated as having been deprived of jurisdiction over such actions. In the tribal context, a mere implied deprivation of otherwise-available authority is particularly inappropriate. *See, e.g., Montana v. Blackfeet Tribe of Indians,* 471 U.S. 759, 766 (1985); *Merrion v. Jicarilla Apache Tribes,* 455 U.S. 130, 152 (1982); *cf. White Mountain Apache Tribe v. Bracker,* 448 U.S. 136, 143 (1980) ("Tribal reservations are not States, and the differences in the form and nature of their sovereignty make it treacherous to import to one notions of pre-emption that are properly applied to the other.").

The absence of a right of removal might indicate an intent to deny jurisdiction if no rational basis for having jurisdiction without removal could be imagined. But that is not the case here. The choice reflected in the Act—providing for removal from State courts but not tribal courts—is one that, for several reasons, "Congress could rationally have made." *International Primate Protection League,* 500 U.S. at 85. Most obviously, as we have discussed, Congress has a special, recently reaffirmed policy of encouraging development of tribal courts. Furthermore, removal is not necessary to obtain federal-court consideration of the very federal question at issue here, namely, the jurisdiction of the tribal court, which, under *National Farmers,* will be reviewed following the tribal-court proceedings if petitioners wish.[39] In contrast, federal questions in a civil state-court case, as a practical matter, typically escape any federal-court review in the absence of removal, because the only means of review is certiorari in this Court. Finally, in the Price-Anderson Act in particular, Congress could have considered the limited nature

[39] It is an open question whether other federal-law issues in a tribal court may be reviewed in federal court after completion of tribal-court proceedings. *See* Royster, *Stature and Scrutiny: Post-Exhaustion Review of Tribal Court Decisions,* 46 U. Kan. L. Rev. 241 (1998).

of nuclear activities on Indian lands or Reservations (most of which are in the nature of mining) and rationally concluded, as a practical matter, that any resulting "public liability" actions within tribal courts' jurisdiction were simply unlikely to be of the Three Mile Island sort contemplated by the removal and consolidation provisions of Section 2210(n).

B. Nothing about the nature of claims deemed to arise under the Price-Anderson Act creates an ouster of jurisdiction in the tribal courts, let alone an express ouster. The courts of the Navajo Nation adjudicate federal-law claims,[40] as do other tribal courts.[41] This Court recognized as much when it left adjudication under the Indian Civil Rights Act, 25 U.S.C. § 1302, to tribal courts in *Santa Clara Pueblo v. Martinez,* 436 U.S. 49, 65-66 (1978). The Court, moreover, has rejected any theory of incompetence of tribal courts to decide complex federal-law questions. In *National Farmers,* the Court expressly stated that the jurisdictional inquiry depended on just such a complex federal-law inquiry, yet held that it is precisely that inquiry which should, in the first instance, be undertaken by the tribal court. 471 U.S. at 856. And, in *Iowa Mutual,* the Court reiterated that "[t]he alleged incompetence of tribal courts is not among the exceptions to the

[40] The Navajo courts have jurisdiction under Navajo law to decide issues of federal law (7 Navajo Tribal Code § 204(a)) and have done so, including preemption claims, when the occasion has arisen. *E.g., Pela v. Peabody Coal Co.,* N.L.R. Supp. 156 (Nav. Sup. Ct. 1990); *Estate of Jumbo,* N.L.R. Supp. 112 (Nav. Sup. Ct. 1990); *Arizona Public Serv. Co. v. Office of Navajo Labor Relations,* N.L.R. Supp. 162, 171-72 (Nav. Sup. Ct. 1990).

[41] *E.g., Crow Tribe of Indians v. Santala,* 21 I.L.R. 6096 (Crow Tribal Ct. 1994); *Hopi Tribe v. Manycow,* 21 I.L.R. 6080 (Hopi Tr. Ct. 1994); *Colville Confederated Tribes v. Stock West, Inc.,* 21 I.L.R. 6075 (Colv. Tr. Ct. 1994); *Coeur D'Alene Tribe v. AT&T Corp.,* 23 I.L.R. 6060 (Coeur D'Alene Tr. Ct. 1996); *Estate of Tasunke Witko (Crazy Horse) v. G. Heileman Brewing Co.,* 23 I.L.R. 6104 (Rosebud Sioux Sup. Ct. 1996). *See also United States v. Plainbull,* 957 F.2d 724 (9th Cir. 1992) (requiring exhaustion of trespass claims under 25 U.S.C. § 179).

exhaustion requirement . . . and would be contrary to the congressional policy promoting the development of tribal courts." 480 U.S. at 19 (footnote omitted).

More pointedly, this Court has explained (in the highly pertinent OCSLA context) that it is particularly inappropriate to conclude that Congress had deprived state courts of jurisdiction to hear federal-law claims where the claims involved are "claims whose governing rules are borrowed from state law." *Gulf Offshore*, 453 U.S. at 484. Here, even if respondents' claims come under the deemer clause, the tribal courts would, under that clause, presumptively apply traditional common-law standards, and federal regulatory standards may never even enter the cases. Moreover, the governing common law may well be that of the Navajo Nation. The reference to "law of the State" in the deemer clause has been construed to invoke the whole law of the State, including choice-of-law principles (*see In re Hanford Nuclear Reservation Litigation*, 780 F. Supp. 1551 (E.D. Wash. 1991)), in keeping with the longstanding interpretation of the comparable provision of the Federal Tort Claims Act, 28 U.S.C. § 1346(b) (United States liable "in accordance with the law of the place where the act or omission occurred"). *See Richards v. United States*, 369 U.S. 1, 11 (1962). The state choice-of-law principles may lead to the choice of tribal law, perhaps under compulsion of federal-Indian-law principles, to govern torts committed against Indians on Tribe-owned land within the Reservation.[42] Alternatively, the choice-of-law issue may never have to be decided because common-law standards of the State and of the relevant Tribe may effectively be the same.

There is, therefore, no reason to depart from the doctrine of exhaustion established in *National Farmers* and

[42] *See also Fidelity Federal Savings & Loan Ass'n v. De La Cuesta*, 458 U.S. 141, 157 & n.12 (1982) (federal law is "part of the law of every State"; construing "'law of the jurisdiction' in which the property is located" as incorporating federal law, because "the 'law of the jurisdiction' includes federal as well as state law").

Iowa Mutual. Nothing in the Price-Anderson Act constitutes an express jurisdictional bar to tribal-court consideration of claims deemed to arise under the Act. If Congress wants tribal-court defendants to be able to redirect suits against them to federal court, then it should enact a removal provision. Until that time, however, the tribal courts should be permitted in the first instance to exercise (and resolve any question about) their jurisdiction without interference from the federal courts.

CONCLUSION

The judgment of the court of appeals should be affirmed. If this Court concludes that the court of appeals was without jurisdiction to reverse the orders against respondents, then it should affirm that part of the judgment affirming the orders against petitioners.

Respectfully submitted,

H. BARTOW FARR, III
RICHARD G. TARANTO
FARR & TARANTO
1850 M Street, N.W.
Washington, DC 20036
(202) 775-0184

MOSHE MAIMON
STEVEN J. PHILLIPS
LEVY, PHILLIPS & KONIGSBERG LLP
520 Madison Ave.
New York, NY 10022
(212) 605-6200

MAX W. BERGER
SETH RICHARD LESSER *
LOUIS C. PAUL
BERNSTEIN LITOWITZ BERGER & GROSSMANN LLP
1285 Avenue of the Americas
New York, NY 10019
(212) 554-1400

CHERIE V. DAUT
P.O. Box 269
Farmington, NM 87499
(505) 368-5927

January 14, 1999

* Counsel of Record

Supreme Court, U.S.
FILED
FEB 16 1999
CLERK

No. 98-6

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1998

EL PASO NATURAL GAS COMPANY, *ET AL.*,

PETITIONERS,

v.

LAURA NEZTSOSIE, *ET AL.*,

RESPONDENTS.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

REPLY BRIEF FOR PETITIONERS

Lynn H. Slade
Walter E. Stern
MODRALL, SPERLING, ROEHL, HARRIS & SISK, P.A.
500 Fourth Street, N.W.
NationsBank Tower
Suite 1000
Albuquerque, NM 87102
(505) 848-1800

James R. Atwood*
Richard A. Meserve
COVINGTON & BURLING
1201 Pennsylvania Ave., N.W.
P.O. Box 7566
Washington, DC 20044-/566
(202) 662-6000

Tom Galbraith
MEYER HENDRICKS & BIVENS, P.A.
3003 North Central Avenue
Suite 1200
Phoenix, AZ 85012-2199
(602) 604-2172

Attorneys for Petitioners

*Counsel of Record

26pp

STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

In addition to the entities identified in the Rule 29.6 statement in the Brief for Petitioners, an additional non-wholly owned affiliate of El Paso Natural Gas Company is Fife Power.

TABLE OF CONTENTS

Page

Statement Pursuant to Supreme Court Rule 29.6 i

Table of Contents i

Table of Authorities ii

Reply Brief of Petitioners 1

A. Respondents' Tribal Law Claims Are Within the Scope of Price-Anderson and Are Therefore Preempted. 1

B. Tribal Exhaustion on the Preemption Issue Would Serve No Useful Purpose and Would Frustrate the Basic Objectives of Price-Anderson. 13

C. Having Failed To Appeal the District Court's Injunctions, Respondents May Not Assert Price-Anderson Claims in Tribal Court. 16

D. Tribal Courts Lack Jurisdiction To Hear Price-Anderson Claims. 18

Conclusion 20

TABLE OF AUTHORITIES

Page

Cases

American Well Works Co. v. Layne & Bowler Co., 241 U.S. 257 (1916) 10

Arkansas Elec. Coop. v. Arkansas Pub. Serv. Comm'n, 461 U.S. 375 (1983) 20

Auer v. Robbins, 117 S. Ct. 905 (1997) 6

Baldwin v. Redwood City, 540 F.2d 1360 (9th Cir. 1976) 17

Bates v. United States, 118 S. Ct. 285 (1997) 7

Begay v. United States, 591 F. Supp. 991 (D. Ariz. 1984), *aff'd*, 768 F.2d 1059 (9th Cir. 1985) 3-4

Browder v. Director, Dept. of Corrections of Ill., 434 U.S. 257 (1978) 16

Brown v. Kerr-McGee Chemical Corp., 767 F.2d 1234 (7th Cir. 1985) 13

Crist v. Dickson Welding, Inc., 957 F.2d 1281 5th Cir. 1992) 18

EF Operating Corp. v. American Bldgs., 993 F.2d 1046 (3d Cir. 1993) 18

Escondido Mut. Water Co. v. La Jolla Band of Mission Indians, 466 U.S. 765 (1984). 7

Federal Land Bank of St. Paul v. Bismark Lumber Co., 314 U.S. 95 (1941) 9

Gassie v. SMH Swiss Corp., 1998 WL 71647 (E.D. La. Feb. 17, 1998) 6

Gilberg v. Stepan Co., 24 F.Supp. 2d 325, *aff'd*, CA-98-139 (KSH) (D.N.J. Dec. 14, 1998) 6

Granberry v. Greer, 481 U.S. 129 (1987) 14

In re TMI Litig. Cases Consol. II, 940 F.2d 832 (3d Cir. 1991) 2, 10, 11, 15

Iowa Mutual Ins. Co. v. LaPlante, 480 U.S. 9 (1987) 14

Johnson v. Teamsters Local 559, 102 F.3d 21 (1st. Cir. 1996) 17, 18

Kerr-McGee Corp. v. Farley, 115 F.3d 1498 (10th Cir. 1997), *cert. denied*, 118 S. Ct. 880 (1998) 6, 8

Knowles v. Iowa, 119 S. Ct. 484 (1998) 1

Langnes v. Green, 282 U.S. 531, 537 (1931) 17-18

Lytle v. Household Manufacturing, Inc., 494 U.S. 545 (1990) 1-2

Marts v. Hines, 117 F.3d 1504 (5th Cir. 1998), *cert. denied*, 118 S. Ct. 716 (1998) 18

Mesa v. California, 489 U.S. 121 (1989) 10

Montana v. United States, 450 U.S. 544 (1981) 14

Morley Construction Co. v. Maryland Casualty Co., 300 U.S. 185 (1937) 18

National Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845 (1985) 14, 16

Northeast Ohio Reg'l Sewer District v. Advanced Med. System, Inc., 666 N.E.2d 612 (Ohio Ct. App. 1995) 6

Northern States Power Co. v. Minnesota, 447 F.2d 1143 (8th Cir. 1971), *aff'd*, 405 U.S. 1035 (1972) 9-10

O'Connor v. Commonwealth Edison Co., 13 F.3d 1090 (7th Cir. 1994) 10

Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n, 461 U.S. 190 (1983) 19

Puerto Rico Department of Consumer Affairs v. Isla Petroleum Corp., 485 U.S. 495 (1988) 20

Ray v. Atlantic Richfield Co., 435 U.S. 151 (1978) 20

Robicheaux v. Radcliff Material, Inc., 697 F.2d 662 (5th Cir. 1983) 18

Silkwood v. Kerr-McGee Corp., 464 U.S. 238 (1984) 8, 15

Stockstill v. Petty Ray Geophysical, Division of Geosource, Inc., 888 F.2d 1493 (5th Cir. 1989) 18

Strate v. A-1 Contractors, 520 U.S. 438 (1997) 13-15, 16, 19-20

Torres v. Oakland Scavenger Co., 487 U.S. 312 (1988) 17-18

Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480 (1983) 10, 12

United States v. Alaska, 117 S. Ct. 1888 (1997) 7

Young Radiator Co. v. Celotex Corp., 881 F.2d 1408 (7th Cir. 1989) 18

Constitution, Statutes and Rules

U.S. Const. art. I 9

U.S. Const. art. III 9-13

Assimilative Crimes Act, 18 U.S.C. § 13 10

Atomic Energy Act of 1946, ch. 724, 60 Stat. 755 4

Atomic Energy Act of 1954, *as amended*

42 U.S.C. § 2012(a) 9
42 U.S.C. § 2014(e) 2
42 U.S.C. § 2014(j) 8
42 U.S.C. § 2014(q) 2, 7, 8-9
42 U.S.C. § 2014(t) 6-8
42 U.S.C. § 2014(w) 2, 6
42 U.S.C. § 2014(z) 2
42 U.S.C. § 2014(aa) 2
42 U.S.C. § 2014(hh) 1, 2, 6, 10-12, 15, 20
42 U.S.C. § 2092 4-5
42 U.S.C. § 2201(b) 4-5
42 U.S.C. § 2210(e)(1) 7
42 U.S.C. § 2210(h) 19
42 U.S.C. § 2210(i) 19
42 U.S.C. § 2210(m) 19
42 U.S.C. § 2210(n) 7, 9, 10, 13, 16, 19
42 U.S.C. § 2210(o) 19
42 U.S.C. § 2210(s) 7

Federal Reservations Act, 16 U.S.C. § 457 10

Federal Tort Claims Act, 28 U.S.C. § 1346(b) 10

Foreign Sovereign Immunities Act, 28 U.S.C. § 1330 12

Outer Continental Shelf Lands Act, 43 U.S.C. § 1331 *et seq.* 10

28 U.S.C. § 1331 ..... 10, 16

28 U.S.C. § 1367 13

S. Ct. Rule 15.2 1

Fed. R. App. P. 2 17

Fed. R. App. P. 3 17

Fed. R. App. P. 4 17-18

Regulations and Notices

12 Fed. Reg. 1855 (1947) 5
19 Fed. Reg. 5628 (1954) 5
22 Fed. Reg. 548 (1957) 5
25 Fed. Reg. 8619 (1960) 5
26 Fed. Reg. 284 (1961) 5
10 C.F.R. pt. 20 (1998) 5
10 C.F.R. § 40.13(b) (1998) 5

Legislative Materials

H.R. Rep. No. 100-104 (1987) 8, 10, 11
S. Rep. No. 100-218 (1987) 8, 13
Reauthorization of the Price-Anderson Act, Hearings Before the Subcomm. on Nuclear Regulation of the Senate Comm. on Environment and Public Works, 99th Cong., 1st Sess. (1986) 11

Miscellaneous

13 Charles A. Wright, et al., *Federal Practice and Procedure* (2d ed.) 15-16, 17
Fed. R. App. P. Adv. Comm. Notes 17

REPLY BRIEF OF PETITIONERS

By making arguments not previously raised and by reversing course on others, respondents seek to avoid the dispositive issues before this Court. In tribal court, respondents asserted only tribal law claims and disavowed any reliance on Price-Anderson's "public liability" remedy. They took that same position in the federal district court and court of appeals, even to the point of not appealing injunctions that limited the tribal court proceedings to the claims then pleaded – those based on tribal law. It is clear that those tribal-law claims are preempted by the Price-Anderson Act, and there is no plausible ground for requiring exhaustion of tribal remedies that – as a matter of federal law – have been barred by act of Congress.

A. Respondents' Tribal Law Claims Are Within the Scope of Price-Anderson and Are Therefore Preempted.

1. For the first time in this litigation, respondents acknowledge that their tribal law claims are precluded by the Price-Anderson Act if those claims are within the statute's definition of a "public liability action." 42 U.S.C. § 2014(hh); *see* Resp. Br. 1-2, 23-24. Respondents argue, however, that it is not "plain" that their claims fall within that definition. Their arguments on this point were not made in opposition to the petition for certiorari and, indeed, only one (concerning the need for an indemnification agreement) was raised in the lower courts. Accordingly, those arguments are not properly before the Court and should be disregarded.[1]

---

[1] *E.g., Knowles v. Iowa*, 119 S. Ct. 484, 487 n.2 (1998) (under S. Ct. Rule 15.2, respondent's non-jurisdictional arguments that were not raised in the opposition to certiorari were not properly preserved); *Lytle v. Household Mfg., Inc.*, 494 U.S. 545, 551-52 n.3 (1990) (an argument not (...continued)

Even if considered, respondents' arguments are without merit. In respondents' own words, the reach of the Atomic Energy Act is "concededly broad" and the operative term "public liability action" is "broadly defined." Resp. Br. 28. Since amended in 1988 in order to federalize the law of nuclear torts (Pet. Br. 16-22; U.S. Br. 17-19), Price-Anderson embraces "*any* suit asserting public liability" (42 U.S.C. § 2014(hh)), which means "*any* legal liability arising out of or resulting from a nuclear incident." *Id.* § 2014(w). "[N]uclear incident" includes "*any* occurrence" that causes injuries or death from the "radioactive, toxic, explosive, or other hazardous properties" of nuclear materials. *Id.* § 2014(q).[2]

According to their tribal court complaints, respondents' injuries were caused by one or more of the nuclear materials that trigger a Price-Anderson "public liability action." They allege injury from exposure to radioactive and toxic uranium mine and mill materials including uranium, uranium ore, plutonium, and mill tailings. *E.g.*, App. 20a-21a, 23a-24a, 40a-41a, 48a. Each of these is either a "source material," "byproduct material," or "special nuclear material" within the scope of both the Atomic Energy Act and Price-Anderson. *See* 42 U.S.C. § 2014(e), (z) & (aa); Pet. Br. 10 n.6. A "nuclear incident" occurs whenever there is injury from such materials (42 U.S.C. § 2014(q)), and a suit seeking compensation for those injuries must be brought as a Price-Anderson "public liability action" or not at all (*id.* § 2014(hh)).[3] *See also* U.S. Br. 26-30.

---

presented to either court below and not supported by arguments in the record will not be considered).

[2] Emphasis added in each definition.

[3] "A claim growing out of any nuclear incident is compensable under the terms of [Price-Anderson] or *it is not compensable at all.*" *In re TMI Litig. Cases Consol. II*, 940 F.2d 832, 854 (3d Cir. 1991) (emphasis in original). *See also* other cases cited at Pet. Br. 21 and U.S. Br. 18 n.10.

2. Respondents nonetheless claim, in an unabashed rewriting of the Questions Presented (Resp. Br. i), that their suits "are based on activities apparently *outside* the substantive scope of the Price-Anderson Act and of the Atomic Energy Act." (Emphasis added.) They make this argument on grounds having little or no foundation in actual statutory text: that their injuries arise from uranium *mining*, which they say is outside AEA jurisdiction (Resp. Br. 29-30), and that Price-Anderson's "public liability action" should be limited to nuclear incidents for which a federal indemnification agreement exists (*id.* at 31-38). Neither argument has merit. Indeed, it is simply irrelevant whether or not federal law imposed substantive obligations on the mining and milling activities at issue, or whether or not an indemnification agreement applied. The relevant provisions of Price-Anderson mean what they say, and they are not limited as respondents suggest.

a. First, respondents' argument that uranium mining is outside the scope Price-Anderson was not raised in either lower court or in opposition to the petition for certiorari. It should be rejected as not properly preserved. *See* n.1 *supra*.

Second, neither the AEA nor Price-Anderson contains any exemption for uranium mining activities.[4] It is true that the AEC and NRC have not exercised broad, OSHA-type regulation over mining. *See generally Begay v. United States*, 591 F. Supp. 991 (D. Ariz. 1984), *aff'd*, 768 F.2d 1059 (9th Cir. 1985) (describing regulatory history of ura-

---

[4] In any event, mill processing is indisputably subject to AEC licensing and other regulatory controls, and respondents acknowledge that the Richards tribal court complaint expressly challenges uranium *milling* as well as mining activities, including milling activities by Cyprus's predecessor. *See* App. 40a-45a; Resp. Br. 11 n.14. Factual issues that are suggested by respondents for the first time in their brief, such as when a particular mill was constructed and to which mills Mr. Richards was exposed, do not serve to take their complaint outside the scope of Price-Anderson.

nium mines in and near the Navajo reservation). But that is not germane. Respondents' claims are unlike those in *Begay*, a pre-1988 Amendments case, in which underground uranium miners alleged that they contracted lung cancer from exposure to radium and radon gas. The *Begay* court decided that radium and radon gas "were not covered by the definitions of source, byproduct or special nuclear material, [and thus] they were not subject to AEC's regulatory authority." 591 F. Supp. at 1003. Whether or not that categorization of radium and radon gas was correct (and, the court was construing AEA regulatory provisions and not Price-Anderson), respondents here have raised claims based on the radioactive and toxic effects of statutory nuclear materials. Clearly, tort claims based on exposure to such nuclear materials are within Price-Anderson. Respondents do not even hint at a textual basis for arguing otherwise.

Further, the AEA *does* establish federal jurisdiction over mine operators' handling of source material and – where applicable – byproduct and special nuclear materials. Section 161 gave the AEC (now, the NRC) broad authority to "establish by rule, regulation, or order, such standards and instructions to govern the possession and use of special nuclear material, source material, and byproduct material as the Commission may deem necessary or desirable to promote the common defense and security or to protect health or to minimize danger to life or property." 42 U.S.C. § 2201(b). This authority is not limited by the location of the nuclear material or the entity in possession. Respondents emphasize a qualification in a different provision, AEA § 62, which requires source material licenses only "after [the source material's] removal from its place of deposit in nature." 42 U.S.C. § 2092; *see* Resp. Br. 4-5, 29. Based on that language, the AEC concluded that it would not require licenses for the mining process itself, but nonetheless miners were required to have licenses for the transfer and shipment of their uranium ore.[5] Section 62's limitation on one particular licensing requirement did not diminish the Commission's unqualified general authority under section 161 to regulate all "possession and use" of source material, and AEC decisions not to fully exercise its jurisdiction did not undermine its plenary authority over source material and other statutory nuclear materials. Finally, those agency policy judgments on what to regulate and what to exempt from regulation cannot in any event effect a reduction in Price-Anderson's unqualified statutory scope.[6]

b. Respondents also argue that nuclear torts qualify as Price-Anderson "public liability actions" only where a government indemnification agreement applies to the nuclear incident in question. This argument was not raised in the opposition to certiorari, rests on an artificial reading of statutory language, and is contrary to the considered views of

---

[5] *See, e.g.*, Notice of Proposed Rulemaking, 25 Fed. Reg. 8619 (1960) ("Under the present regulation, miners are required to have a license to transfer the source material after it is mined"; AEA § 62 "does not, however, require a license for the mining of the source material").

License requirements were initially imposed under the Atomic Energy Act of 1946, ch. 724, 60 Stat. 755 (*see* 12 Fed. Reg. 1855 (1947) ("Control of Source Material")), and carried forward upon adoption of the AEA in 1954. 19 Fed. Reg. 5628 (1954). All licensees, including miners with source material licenses such as petitioners, were subject to comprehensive standards dealing with radiation hazards. *See* 22 Fed. Reg. 548 (1957) ("Standards for Protection Against Radiation"). Those standards, the current version of which is found at 10 C.F.R. pt. 20 (1998), contained specific restrictions on the use and transfer of uranium ore and other licensed material, including levels of permissible radiation exposure and radiation releases into the air and water, and on waste disposal.

Subsequently, in 1961, the Commission exempted transfers of unrefined and unprocessed ore from this licensing requirement. 26 Fed. Reg. 284 (1961), *currently codified at* 10 C.F.R. § 40.13(b). But, because the mining activities at issue in this litigation occurred primarily in the 1950s, respondents' claim that miners were unregulated is incorrect.

[6] Nor does it follow that the preemptive effect of AEA regulatory jurisdiction is thereby diminished. *See* pp. 19-20 n.31 *infra*.

the NRC and DOE, the two agencies charged with administering the Price-Anderson Act. *See* U.S. Br. 27-30.[7] It is also at odds with the views of virtually all courts that have addressed the issue.[8]

Respondents argue that the scope of "public liability action" (42 U.S.C. § 2014(hh)) is restricted by the definition of "person indemnified" (§ 2014(t)), even though the latter term nowhere appears in the former. They observe that the "person indemnified" definition includes those with federal indemnification agreements "*and* any other person who may be liable for public liability." § 2014(t) (emphasis added). It follows – respondents argue – that for every "public liability" there must be a "person indemnified," and hence there can be no "public liability" (§ 2014(w)) or "public liability action" (§ 2014(hh)) without an indemnification agreement. Resp. Br. 31-32.

This argument reads the statute backwards, plucking from the definition of "person indemnified" a phrase that is intended to broaden that term, and then claiming that the broadened term operates to restrict dramatically the scope of other provisions that do not even reference "person indemnified." Section 2014(hh)'s definition of "public liability action," for example, contains no hint that it is limited to

[7] The views of these agencies are entitled to substantial deference. *See Auer v. Robbins*, 117 S. Ct. 905, 912 (1997) (Secretary of Labor's regulatory interpretation, even though stated for the first time in *amicus* brief, is entitled to deference where "[t]here is simply no reason to suspect that the interpretation does not reflect the agency's fair and considered judgment on the matter in question").

[8] *See Kerr-McGee Corp. v. Farley*, 115 F.3d 1498, 1504 (10th Cir. 1997), *cert. denied*, 118 S.Ct. 880 (1998); *Gassie v. SMH Swiss Corp.*, No. Civ. A. 97-3557, 1998 WL 71647 (E.D. La. Feb. 17, 1998); *Northeast Ohio Reg'l Sewer Dist. v. Advanced Med. Sys., Inc.*, 666 N.E.2d 612 (Ohio Ct. App. 1995). A contrary decision by the magistrate in *Gilberg v. Stepan Co.*, 24 F. Supp. 2d 325, *aff'd*, CA-98-139 (KSH) (D.N.J. Dec. 14, 1998) (unpublished letter-order & opinion), is flawed for the reasons set forth in the text.

indemnification cases, and neither do the definitions of "public liability" (§ 2014(w)), "nuclear incident" (§ 2014(q)), or any other term that Congress used to identify those cases that are included within "public liability action."

"[I]t should be generally assumed that Congress expresses its purposes through the ordinary meaning of the words it uses." *Escondido Mut. Water Co. v. La Jolla Band of Mission Indians*, 466 U.S. 765, 772 (1984). Respondents' convoluted inverse stacking of definitional provisions violates this "ordinary meaning" rule. Further, some of the operative (as opposed to definitional) provisions of Price-Anderson are explicitly limited to cases involving indemnification agreements[9] and others are not.[10] Under respondents' reading, this specific limitation in some provisions is superfluous because (in their view) the entire statute is already so limited. But, "[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *E.g., Bates v. United States*, 118 S. Ct. 285, 290 (1997) (citation omitted). A court should "avoid an interpretation of a statute that renders some words altogether redundant." *E.g., United States* v. *Alaska*, 117 S. Ct. 1888, 1918 (1997) (citation omitted).[11]

[9] *E.g.*, 42 U.S.C. § 2210(e)(1) (cap on liability), § 2210(n)(1) (waiver of certain defenses), § 2210(s) (punitive damages ban).

[10] *E.g.*, 42 U.S.C. § 2210(n)(2) (federal jurisdiction and removal), § 2210(n)(3) (special case management for nuclear torts).

[11] The United States observes in its brief (U.S. Br. 28-29 n.16) that the real reason for inclusion of "any other person who may be liable" in § 2014(t) was to ensure that the statute's indemnification provisions would be read *broadly* to cover non-indemnified defendants involved in nuclear accidents for which any relevant party was indemnified. The phrasing cannot be read to have the opposite effect: to void the *general* provisions of Price-Anderson in the absence of an indemnification agreement. Respondents thus wrongly imply (Resp. Br. 7 & 31) that the

(...continued)

Wholly apart from indemnification issues, Congress had good reason when enacting the 1988 Amendments to apply Price-Anderson to *all* torts arising out of nuclear incidents. In the wake of Three Mile Island, Congress saw the need to "expand[] existing law to allow for the consolidation of claims arising out of any nuclear incident in federal district court." S. Rep. No. 100-218, at 13 (1987). For example, "[t]he availability of the provisions for consolidation of claims in the event of any nuclear incident . . . would avoid the inefficiencies resulting from duplicative determinations of similar issues in multiple jurisdictions that may occur in the absence of consolidation."[12] There is, accordingly, no basis for respondents' claim (Resp. Br. 35-36) that Congress's sole interest in the 1988 Amendments was to address federal indemnification cases.[13]

United States' reading of § 2014(t) supports their own. In fact, the United States expressly rejects respondents' position. U.S. Br. 27-30.

Equally misleading is respondents' suggestion (Resp. Br. 31) that their argument is supported by *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 251 & n.12 (1984). The Court in *Silkwood* merely cited § 2014(t) for the proposition that government indemnification was not available under the facts of that case. The decision preceded the 1988 Amendments and did not involve construction of "public liability action" or any other provision relevant to the present issues. *See Kerr-McGee v. Farley*, 115 F.3d at 1504 (rejecting the argument that *Silkwood* supports a requirement for an indemnification agreement for Price-Anderson to apply); U.S. Br. 30 n.18 (same).

[12] *Id. See also, e.g.*, H.R. Rep. No. 100-104, at 29 (1987) (amendment providing for consolidation of claims involving "all nuclear incidents" in federal court under Price-Anderson "is necessary to ensure the equitable and uniform treatment of all victims and the coordination of all phases of litigation that could result from a large nuclear accident, even though the accident may not constitute an 'extraordinary nuclear occurrence'").

[13] Respondents also argue (Br. 34-35) that, because the definition of "extraordinary nuclear occurrence" (42 U.S.C. § 2014(j)) is limited to situations involving indemnification agreements and because the term "nuclear incident" includes "extraordinary nuclear occurrences" (§ 2014(q)), the limitation of one should be read into the other. But "nuclear incident" is expressly defined as "*any* occurrence, *including* an ex-

(...continued)

c. Respondents' final effort to obtain a judicial narrowing of Price-Anderson is to argue, for the first time in this litigation, that constitutional concerns may have motivated Congress to intend a narrower scope for the statute than its plain language suggests. Specifically, respondents say that Price-Anderson presents Article III problems as applied to mining-related claims because in such a case it is a "pure jurisdictional statute," simply assigning state causes of action to federal courts with no substantive federal content. Resp. Br. 36-38. The argument is entirely without merit.

No Article III issue is presented when Congress enacts a statute within its Article I powers and confers jurisdiction on federal courts to hear suits arising under that statute. Here, Congress' authority under Article I to legislate in the field of nuclear energy and safety – a subject "vital to the common defense and security" (42 U.S.C. § 2012(a)) – cannot be doubted.[14] And, the 1988 Amendments do not – as respon-

---

traordinary nuclear occurrence" (*id.*, emphasis added), thus confirming the obvious: that the term "nuclear incident" is more inclusive than "extraordinary nuclear occurrence." *See Federal Land Bank of St. Paul* v. *Bismark Lumber Co.*, 314 U.S. 95, 100 (1941) ("the term 'including' is not one of all-embracing definition, but connotes simply an illustrative application of the general principle"). Further, in the 1988 Amendments, Congress substituted the term "nuclear incident" for "extraordinary nuclear occurrence" in Price-Anderson's jurisdiction and removal provisions, specifically for the purpose of broadening their scope to embrace all nuclear incidents. 1988 Amendments Act § 11(a), 102 Stat. 1076, *amending* 42 U.S.C. § 2210(n)(2); *see* Pet. Br. 18-19. Respondents would reintroduce a limitation that Congress expressly eliminated.

[14] *See, e.g., Northern States Power Co. v. Minnesota*, 447 F.2d 1143, 1147 (8th Cir. 1971), *aff'd*, 405 U.S. 1035 (1972):

> [T]here can be no doubt but that Congress was acting within its constitutionally delegated authority in establishing a system of regulation over the entire spectrum of atomic energy, including the imposition of federal controls over health and safety standards. Congressional findings concerning the development, use and control of atomic energy demonstrate reliance upon the constitutionally granted powers over the

(...continued)

dents suggest – create federal jurisdiction for state claims; rather, the amendments both provide a cause of action under federal law (42 U.S.C. § 2014(hh)) and then separately confer jurisdiction upon federal courts to hear such actions (*id.* § 2210(n)(2)).[15] A case "arises under" federal law when, as here, federal law "creates the cause of action." *American Well Works Co. v. Layne & Bowler Co.*, 241 U.S. 257, 260 (1916) (Holmes, J.).[16]

Nor is a constitutional issue presented because Congress determined that certain substantive rules for decision in Price-Anderson federal actions should be derived from state law. In a variety of contexts – *e.g.*, the Federal Tort Claims Act, 28 U.S.C. § 1346(b), the Assimilative Crimes Act, 18 U.S.C. § 13, the Federal Reservations Act, 16 U.S.C. § 457, and the Outer Continental Shelf Lands Act, 43 U.S.C. § 1331 *et seq.* – Congress has adopted state substantive law.[17] This

---

common defense and security, interstate and foreign comerce and promotion of the general welfare.

[15] *See TMI*, 940 F.2d at 857 (Congress provided "the clearest expression of intent that there be a federal cause of action arising directly under the Act"); *O'Connor v. Commonwealth Edison Co.*, 13 F.3d 1090, 1099-100 (7th Cir. 1994) ("a state cause of action is not merely transferred to federal court; instead, a new federal cause of action supplants the prior state cause of action"); H.R. Rep. No. 100-104, pt. 1, at 18 (1987) (Congress intended to "mak[e] suits asserting public liability '[c]ases arising under the [l]aws of the United States' within the meaning of Article III") (internal ellipsis omitted).

[16] Price-Anderson is thus readily distinguishable from the statute in *Mesa v. California*, 489 U.S. 121 (1989), the case on which respondents principally rely. There, the Court was dealing with a provision under which state law claims – presenting no federal law issues – were removable to federal court *as state law actions*. Also distinguishable are decisions construing 28 U.S.C. § 1331 (Resp. Br. 38 n.33) because Article III "arising under" jurisdiction is broader than federal-question jurisdiction under § 1331. *See Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 495 (1983).

[17] The legislative history of the 1988 Amendments indicates that Congress modeled its approach on the Outer Continental Shelf Lands Act. (...continued)

does not mean that "no federal substantive standards apply." Resp. Br. 38. Although borrowed in part from state law, the standards applied in a Price-Anderson suit are nonetheless *federal* standards by operation of the statute. Congress has power to enact such an approach; indeed, "the power of Congress to confer federal jurisdiction in these cases and to give content to the federal law by adopting state rules of decision has never been questioned." *TMI*, 940 F.2d at 856 (citations omitted).[18]

Moreover, there are significant federal law components to Price-Anderson suits, even apart from the federal standards that are borrowed from state law. For example, section 2014(hh) imposes a specific choice-of-law rule – "the law of the State in which the nuclear incident involved occurs" – even if state (or, for that matter tribal) choice-of-law rules would call for a different result. And, in resolving disputes ranging from the consolidation of related cases, to the applicability of a federal standard of care, and to the meaning and relevance of licenses, contracts, and leases issued by the federal government, the court will have to interpret the Atomic Energy Act and other relevant federal statutes. *E.g.*, Pet. Br. 21; U.S. Br. 18; Resp. Br. 6 & n.5. Significant federal law

---

See H.R. Rep. No. 100-104, at 18; *TMI*, 940 F.2d at 855-56; U.S. Br. 18 n.10.

[18] Respondents' summary of the 1988 legislative history on this point is misleading. In the very testimony that they cite as "the only apparent substantial response" to a supposed "congressional concern" about the constitutionality of the 1988 Amendments (Resp. Br. 36-37), Congress was told that "it is not necessary for Congress to provide the substantive standards for recovery in a given action in order to support a grant of subject matter jurisdiction over that action," and that "when Congress has the power to enact substantive rules in a given field, it also has the power to draw controversies which may implicate construction or effectuation of its enactment or policies into a federal forum." *Reauthorization of the Price-Anderson Act, Hearings Before the Subcomm. on Nuclear Regulation of the Senate Comm. on Environment and Public Works*, 99th Cong., 1st Sess. 90-91 (1986) (citations omitted).

issues will inherently be involved in every Price-Anderson suit.

Finally, section 2014(hh) is clearly constitutional when viewed in the fuller context of the AEA and the Price-Anderson Act. In *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480 (1983), a Dutch corporation brought suit in federal court against Nigeria for breach of contract. Jurisdiction was based on the Foreign Sovereign Immunities Act, which confers jurisdiction in federal court over suits between aliens and foreign states. 28 U.S.C. § 1330(a). Although the cause of action was not based on federal law (it was based either on state law or international law), the Court nevertheless upheld jurisdiction under Article III. "By reason of its authority over foreign commerce and foreign relations, Congress has the undisputed power to decide, as a matter of federal law, whether and under what circumstances foreign nations should be amenable to suit in the United States." 461 U.S. at 493. Further, "the jurisdictional provisions of the Act are simply one part of [a] comprehensive scheme. The Act . . . does not merely concern access to the federal courts." *Id.* at 496.

Likewise here, section 2014(hh) of Price-Anderson is part of a "comprehensive scheme" – an extensive federal program dealing with a subject of vast national importance. As part of that program, Congress exercised its Article I powers to decide whether and under what circumstances claims growing out of a nuclear incident should be compensable, and what procedures and forums should be available to ensure fair, equitable and efficient treatment. This decision to convert any and all nuclear tort suits into "action[s] arising under" federal law (42 U.S.C. § 2014(hh)) as "part of [a] comprehensive scheme" (*Verlinden*, 461 U.S. at 496) is undoubtedly constitutional.

* * * *

Accordingly, there is no serious Article III obstacle to applying Price-Anderson as Congress has written it. Respondents pleaded only tribal claims in tribal court,[19] and they now concede that those claims cannot stand if – as we have shown – they are within Price-Anderson. The claims in tribal court are therefore preempted.[20]

B. Tribal Exhaustion on the Preemption Issue Would Serve No Useful Purpose and Would Frustrate the Basic Objectives of Price-Anderson.

A fundamental purpose of the Price-Anderson Act is to "encourage the equitable, prompt, and efficient resolution of cases arising out of [any] nuclear incident." 42 U.S.C. § 2210(n)(3)(c)(vi); *see also* S. Rep. No. 100-218, at 4 (1987) (the Act provides a mechanism that is "equitable, efficient, reliable, and comprehensive"). Thus, once it is clear that tribal law claims have been preempted by Price-Anderson, unwarranted and futile litigation should be halted. Exhaustion of tribal remedies would "serve no purpose other

---

[19] While respondents' brief seeks to muddy the waters on this point, they conceded in the lower courts that the tribal court proceedings involved only "Navajo common law claims" and that "no relief [under Price-Anderson] has been sought." *E.g.*, Defendants-Appellees' Joint Opening Brief to the Ninth Circuit, at 1 & 4 n.1 (Jan. 9, 1997). *See also* App. 81a.

[20] Respondents suggest that the cause of their injuries was "perhaps not limited to source materials." Resp. Br. 38. Even if true, Price-Anderson would nonetheless apply. *See, e.g., Brown v. Kerr-McGee Chem. Corp.*, 767 F.2d 1234, 1240-42 (7th Cir. 1985) (AEA federal preemption precludes state regulation of an inseparable mixture of AEA-regulated and -unregulated materials). It would obviously be inefficient and cumbersome to have some elements of a toxic tort case heard in tribal court and other elements in federal court. Respondents could readily include in a federal Price-Anderson suit any claims that source-material injuries were enhanced by associated non-AEA materials. *Cf.* 28 U.S.C. § 1367 (supplemental jurisdiction).

than delay" (*Strate v. A-1 Contractors*, 520 U.S. 438, 460 n.14 (1997)) and would undermine Price-Anderson's objectives. *See National Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 856 n.21 (1985) (exhaustion is not required where, *e.g.*, it would be futile or contrary to express jurisdictional prohibitions).[21]

Strate made clear that the tribal exhaustion doctrine should not be applied in an inflexible, mechanical fashion.[22] Respondents argue, nonetheless, that *Strate* is relevant only where the objection to tribal proceedings is territorial rather than substantive. Resp. Br. 21-22.[23] But, notwithstanding that the exhaustion doctrine was judicially developed and is subject to judicial exceptions (*National Farmers*, 471 U.S. at 856 n.21), notwithstanding that it is "prudential" rather than jurisdictional (*Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9, 16 n.8 & 20 n.14 (1987), and notwithstanding that it is "not

[21] The need for an early definitive ruling on preemption is shown by a proliferation of new tribal court complaints raising tribal law claims similar to respondents'. In recent weeks, petitioners have been named in three such suits in which multiple plaintiffs seek compensatory and punitive damages totaling $300 million. *Allison, et al. v. Cyprus Foote Mineral Co., et al.*, No. KY-CV-172-98 (Navajo Dist. Ct., Kayenta); *Todacheenie, et al. v. Rare Metals Corp. & El Paso Natural Gas Co.*, No. TC-CV-267-98 (Navajo Dist. Ct., Tuba City); *Yazzie, et al. v. Cyprus Foote Mineral Co. et al.*, No. TC-CV-266-98 (Navajo Dist. Ct., Tuba City).

[22] Pet. Br. 29-30. Respondents quote a phrase in *Granberry v. Greer*, 481 U.S. 129, 131 (1987), that they suggest shows that the tribal exhaustion rule should be "an inflexible bar to consideration of the merits." Resp. Br. 20. But, in considering federal/state exhaustion questions in that habeas corpus action (Indian law issues were not involved), the Court in fact *rejected* such an approach. Although the Court cited *National Farmers* and *Iowa Mutual*, using a "*cf.*" signal, as examples of an "inflexible" exhaustion rule, the passage is hardly an endorsement of inflexibility.

[23] Petitioners do not concede that, under the standards of *Montana v. United States*, 450 U.S. 544 (1981), their activities on leased tribal lands and pursuant to AEC contracts subjected them to the territorial jurisdiction of the tribe (wholly aside from the Price-Anderson issues presented here). That question is not before the Court.

an unyielding requirement" (*Strate*, 520 U.S. at 449 n.7), respondents offer no logical rationale for this distinction. The issue should be, as in *Strate*, whether exhaustion would serve potentially beneficial objectives – such as where a tribal court's findings and conclusions on tribal law may inform the federal court on relevant issues. But where – as here – a non-member of a tribe has properly invoked federal court jurisdiction and has properly pleaded a claim that tribal proceedings against the non-member exceed the tribe's authority under federal law, and especially where the merits of that claim can be decided as a straight issue of federal law, the exhaustion doctrine should not preclude prompt resolution.[24]

As the United States has argued (U.S. Br. 13-17), this conclusion is particularly compelling in the context of Price-Anderson. Important federal interests prompted Congress to provide an exclusive federal remedy for nuclear torts, to enact a special scheme of procedural, substantive, and remedial provisions for those claims, and thereby to effect "complete preemption" of non-federal remedies.[25] Respondents, in answering the United States' argument, focus almost entirely on the issue of removal, claiming this is a necessary predicate to a federal court's application of the complete preemption doctrine. Resp. Br. 16, 25-26. But this response misses the point. While the issue of complete preemption "tends to come up in removal situations," that is by no means its exclusive province. 13 Charles A. Wright, *et al.*, *Federal Prac-*

[24] Indeed, even if the issue were not "plain" and further development of the factual record were necessary on the question of Price-Anderson preemption, federal rather than tribal courts would be the proper forum to make that inquiry. *See* U.S. Br. 26-27.

[25] Respondents cite *Silkwood* as refuting the preemption point, since the Court there concluded that state tort claims were not preempted by the AEA or the Price-Anderson Act as it then existed. Resp. Br. 24-25. But *Silkwood* preceded the 1988 Amendments with its adoption of section 2014(hh). Pet. Br. 16-19; U.S. Br. 17. "With the Amendments Act . . ., the entire Price-Anderson landscape was transformed." *TMI*, 940 F.2d 832 at 857.

tice and Procedure § 3522 (2d ed. Supp. 1998) (citing cases). Here, petitioners do not need a removal statute; unquestionably, the federal courts have original jurisdiction under 28 U.S.C. § 1331 to consider the claim that the tribal court proceedings exceed the tribe's adjudicatory authority over nonmembers.[26]

The question, then, is whether the tribal exhaustion doctrine compels the federal court to forebear from exercising its undisputed jurisdiction. As the United States explains (U.S. Br. 14-20), Congress created a preemption regime in part to give defendants an absolute right to *immediate* federal court resolution of any threshold dispute concerning whether a nuclear liability suit falls within Price-Anderson. Having jurisdiction, the federal court is empowered – indeed, obligated – to decide that issue. Prolonged delays for the exhaustion of tribal remedies would be contrary to the congressional regime and at odds with a principle of exhaustion that is supposed to be "prudential" and "not unyielding." *Strate*, 529 U.S. at 449 n.7 & 453.

C. Having Failed To Appeal the District Court's Injunctions, Respondents May Not Assert Price-Anderson Claims in Tribal Court.

As respondents conceded below (*see* note 19 *supra*), their complaints in tribal court rested entirely on Navajo

[26] *See Strate*, 520 U.S. at 448; *National Farmers*, 471 U.S. at 850-53. *Strate* specifically noted that no removal statute was available in that case (520 U.S. at 459 & n.13), but the Court nonetheless addressed the federal law issues raised by the challenge to the tribal proceedings.

Amicus curiae Navajo Nation argues that petitioners had available a removal statute, but waived their opportunity to use it. Navajo Nation Br. 6 n.4. Bur its brief misquotes the statute (42 U.S.C. § 2210(n)(2)), which by its terms applies to state court proceedings only. With respect to tribal court proceedings, petitioners correctly invoked their § 1331 remedy.

tribal law and "no relief [under Price-Anderson] has been sought." Indeed, they proved their disinterest in litigating Price-Anderson claims in tribal court by not appealing the injunctions against them on that very issue. They cannot change horses now.

The Federal Rules impose specific time limits within which either to appeal or cross-appeal a preliminary injunction. Fed. R. App. P. 4(a)(1) (appeal) & 4(a)(3) (cross-appeal).[27] Such rules are jurisdictional prerequisites, not optional procedures. Rule 4(a)(1) is "mandatory and jurisdictional" (*Browder v. Director, Dept. of Corrections of Ill.*, 434 U.S. 257, 264 (1978)), and the same conclusion applies to Rule 4(a)(3) under the teaching of *Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 314 (1988). As *Torres* made clear:

> "Rule 3 and Rule 4 combine to require that a notice of appeal be filed . . . within the time prescribed . . . [and] compliance with the provisions of those rules is of the utmost importance." 28 U.S.C.App. p. 467. This admonition by the Advisory Committee makes no distinction among the various requirements of Rule 3 and Rule 4; rather it treats the requirements of the two Rules as a *single jurisdictional threshold.*

487 U.S. at 315 (emphasis added). As a result, courts "may not waive the jurisdictional requirements of Rules 3 and 4, even for 'good cause shown' under Rule 2." *Id.* at 317.[28]

[27] Although respondents claim otherwise (Resp. Br. 13 n.16), an appeal from a preliminary injunction *cannot* be made "at any time." Rather, such an appeal is subject to the same limits applicable to any other interlocutory appeal. *See Baldwin v. Redwood City*, 540 F.2d 1360, 1364 (9th Cir. 1976); 16 Wright, *Federal Practice and Procedure* § 3921.

[28] Contrary to respondents' insinuation (Resp. Br. 43), the 1993 amendments to Rule 3(c) – designed to halt satellite litigation, *see* Fed. R. App. P. 3 Adv. Comm. Note – did *not* "change the mandatory nature of the time limits in Rules 3 and 4" underscored by *Torres*. *Johnson v. Teamsters Local 559*, 102 F.3d 21, 29 n.4 (1st Cir. 1996). In addition, their argument (Resp. Br. 42-43) that dicta in *Langnes v. Green*, 282 U.S.

(...continued)

Rule 4(a)(3) must therefore be treated as a "mandatory and jurisdictional" provision – not merely a discretionary "rule of practice."[29]

Even if Rule 4(a)(3) were, however, treated as a "rule of practice," waiver of its requirements should be allowed only in truly exceptional circumstances,[30] particularly where the parties are represented by experienced litigation counsel and thus presumably made a knowing election not to appeal. To allow "jurisdiction by ambush" in the courts of appeals would inject surprise into the process, preclude fair presentation of unappealed issues, and result in wasteful and unstructured litigation.

D. Tribal Courts Lack Jurisdiction To Hear Price-Anderson Claims.

If the Court were to reach the issue, it should nonetheless uphold the injunctive orders of the district court. As the

---

531, 537 (1931), trump the holdings of *Torres* and *Morley Constr. Co. v. Maryland Casualty Co.*, 300 U.S. 185 (1937), is riddled with flaws. *See Marts v. Hines*, 117 F.3d 1504, 1515 (5th Cir. 1997), *cert. denied*, 118 S. Ct. 716 (1998).

[29] *See, e.g., Johnson*, 102 F.3d at 29 (Rule 4(a)(3) "is mandatory and jurisdictional" under *Torres*); *EF Operating Corp. v. American Bldgs.*, 993 F.2d 1046, 1049 n.1 (3d Cir. 1993) (distinction between Rules 4(a)(1) and 4(a)(3) "is illusory in light of" *Torres*); *Young Radiator Co. v. Celotex Corp.*, 881 F.2d 1408, 1416 (7th Cir. 1989) (*Torres* "made clear" that Rule 4(a)(3) cannot be waived); *see also Crist v. Dickson Welding, Inc.*, 957 F.2d 1281, 1289 (5th Cir. 1992) ("continued viability" of "rule of practice" principle "questionable" under *Torres*); *Stockstill v. Petty Ray Geophysical, Div. of Geosource, Inc.*, 888 F.2d 1493, 1496, 1497 (5th Cir. 1989) ("rule of practice" approach "doubtful" after *Torres*). Even *before Torres*, four circuits had characterized Rule 4(a)(3) as "mandatory and jurisdictional." *See Young Radiator*, 881 F.2d at 1416.

[30] *See, e.g., Robicheaux v. Radcliff Material, Inc.*, 697 F.2d 662, 668 (5th Cir. 1983) (no "exceptional circumstances producing great inequity are here shown of the extra-ordinary nature that on rare occasions has induced" waiver) (a pre-*Torres* case).

United States has convincingly demonstrated (U.S. Br. 22-24), fundamental objectives of the Price-Anderson Act would be frustrated if tribal court adjudications could undermine a basic premise of that Act – the availability of a federal forum and special consolidation and case-management procedures for all nuclear torts, at the request of either the defendant or the United States. *See* 42 U.S.C. § 2210(n)(2) & (3); *see also* Pet. Br. 35. This may be most obvious in cases for which Price-Anderson's financial protection provisions are triggered, thus requiring the United States' participation in the suit or oversight of the distribution of compensation funds by a federal judicial panel. *See, e.g., id.* § 2210(h), (i), (m) & (o). But, as the instant cases illustrate, virtually all Price-Anderson nuclear incident claims will be complex, will spawn multiple and related suits (*see* note 21 *supra*), and will involve questions of federal government contribution and comparative fault, if not federal indemnity.[31]

Moreover, *Strate* articulated an important principle applicable here: "As to nonmembers, we hold, a tribe's adjudicatory jurisdiction does not exceed its legislative jurisdiction." 480 U.S. at 453; *see* Pet. Br. 29-30. By virtue of the Atomic Energy Act, "the Federal Government has occupied the entire field of nuclear safety concerns, except the limited powers expressly ceded to the States." *Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n*, 461 U.S. 190, 212 (1983); *see* Pet. Br. 9-10. Given that the AEC (and later NRC) did not exercise plenary jurisdiction over all aspects of uranium mining (*see* pp. 4-5 *supra*), one might debate whether tribal jurisdiction to regulate mining was or was not preempted and to what degree.[32] The

---

[31] In *Richards*, for example, Cyprus' attempt to file a third party complaint against the United States was rejected by the tribal court, and the case also involves defenses based on federal regulation and comparative fault by the federal government. *See* Pet. Br. 23 & n.37.

[32] Where there is a comprehensive federal regulatory scheme, but where as a policy matter a portion of the regulated field is intentionally left (...continued)

Court need not decide that question, however. What is clear here is that the Atomic Energy Act, with its Price-Anderson component, preempts whatever authority the tribe might otherwise have to legislate on the subject of tort liability for nuclear incidents. 42 U.S.C. § 2014(hh). Thus, whatever the tribe's authority might be in other situations, it lacks the authority to legislate as to nuclear claims and thus the authority to adjudicate claims brought under the Price-Anderson Act.

CONCLUSION

The rulings of the court of appeals should be reversed. Respondents' proper course is to file Price-Anderson claims in federal court.

Respectfully submitted,

Lynn H. Slade
Walter E. Stern
MODRALL, SPERLING, ROEHL, HARRIS & SISK, P.A.

James R. Atwood*
Richard A. Meserve
COVINGTON & BURLING

Tom Galbraith
MEYER HENDRICKS & BIVENS, P.A.

Attorneys for Petitioners
*Counsel of Record

February 16, 1999

---

without federal control, preemption may nonetheless be found for the entire field. *See Puerto Rico Dep't of Consumer Affairs v. Isla Petroleum Corp.*, 485 U.S. 495, 503 (1988); *Arkansas Elec. Coop. v. Arkansas Pub. Serv. Comm'n*, 461 U.S. 375, 384 (1983); *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 178 (1978).

Supreme Court, U.S.
FILED
NOV 8 1998
CLERK

No. 98-6

In the Supreme Court of the United States

OCTOBER TERM, 1998

EL PASO NATURAL GAS COMPANY, ET AL.,
PETITIONERS

v.

LAURA NEZTSOSIE, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING REVERSAL

SETH P. WAXMAN
Solicitor General
Counsel of Record

LOIS J. SCHIFFER
Assistant Attorney General

EDWIN S. KNEEDLER
Deputy Solicitor General

JONATHAN E. NUECHTERLEIN
Assistant to the Solicitor General

MARTIN W. MATZEN
ETHAN G. SHENKMAN
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

JOHN D. LESHY
Solicitor
Department of the Interior
Washington, D.C. 20240

MARY ANNE SULLIVAN
General Counsel
Department of Energy
Washington, D.C. 20585

JOHN F. CORDES
Solicitor
Nuclear Regulatory Commission
Washington, D.C. 20555

QUESTIONS PRESENTED

1. Whether the tribal exhaustion doctrine bars prompt federal court consideration of whether claims initially brought under tribal law in tribal court fall within the completely preemptive scope of the Price-Anderson Act.

2. Whether the court of appeals erred when it vacated the district court's preliminary injunction barring respondents from "seek[ing] relief under the Price-Anderson Act in tribal court" (J.A. 73a), even though respondents had filed no cross-appeal challenging that injunction.

TABLE OF CONTENTS

	Page
Interest of the United States	1
Statement	1
Introduction and summary of argument	5
Argument:	
A. The tribal exhaustion doctrine bars premature federal intervention in tribal court adjudication of ordinary preemption defenses	7
B. The exhaustion doctrine does not bar a federal court from determining, in the first instance, the effect of the Price-Anderson Act's complete preemption scheme on actions pending in tribal court	13
C. Respondents' tribal law claims fall within the preemptive scope of the Price-Anderson Act	26
Conclusion	30

TABLE OF AUTHORITIES

Cases:

Becenti v. *Vigil*, 902 F.2d 777 (10th Cir. 1990)	25
Boys Markets, Inc. v. *Retail Clerks Union*, 398 U.S. 235 (1970)	25
Brogan v. *United States*, 118 S. Ct. 805 (1998)	30
Budinich v. *Becton Dickinson & Co.*, 486 U.S. 196 (1988)	21
Caterpillar Inc. v. *Williams*, 482 U.S. 386 (1987)	14, 15
Cincinnati Radiation Lit., In re, 874 F. Supp. 796 (S.D. Ohio 1995)	30
Duke Power Co. v. *Carolina Envtl. Study Group, Inc.*, 438 U.S. 59 (1978)	2
Franchise Tax Bd. v. *Construction Laborers Vacation Trust*, 463 U.S. 1 (1983)	14

Cases—Continued: Page

Gassie v. *SMH Swiss Corp.*, No. Civ. A 97-3557, 1998 WL 71647 (E.D. La. Feb. 17, 1998) 30
Gilberg v. *Stepan Co.*, No. Civ. A 98-139, 1998 WL 565978 (D.N.J. Aug. 20, 1998) 30
Gulf Offshore Co. v. *Mobil Oil Corp.*, 453 U.S. 473 (1981) 18
Iowa Mut. Ins. Co. v. *LaPlante*, 480 U.S. 9 (1987) 8, 9, 10, 11, 16, 17, 21, 22, 25
Johnson v. *Teamsters Local 559*, 102 F.3d 21 (1st Cir. 1996) 21
Kennerly v. *District Court*, 400 U.S. 423 (1971) 8
Kerr-McGee Corp. v. *Farley*, 115 F.3d 1498 (10th Cir. 1997), cert. denied, 118 S. Ct. 880 (1998) 30
Kerr-McGee Corp. v. *Navajo Tribe*, 471 U.S. 195 (1985) 8-9
Kiick v. *Metropolitan Edison Co.*, 784 F.2d 490 (3d Cir. 1986) 17
Lane v. *Peña*, 518 U.S. 187 (1996) 29
Langnes v. *Green*, 282 U.S. 531 (1931) 20
Massachusetts Mut. Life Ins. Co. v. *Ludwig*, 426 U.S. 479 (1976) 20-21
Merrion v. *Jicarilla Apache Tribe*, 455 U.S. 130 (1982) 8, 9, 22, 24
Metropolitan Life Ins. Co. v. *Taylor*, 481 U.S. 58 (1987) 13, 14, 15, 27
Middlemist v. *Babbitt*, 19 F.3d 1318 (9th Cir.), cert. denied, 513 U.S. 961 (1994) 10
Montana v. *United States*, 450 U.S. 544 (1981) 11
Morley Constr. Co. v. *Maryland Cas. Co.*, 300 U.S. 185 (1937) 21
National Farmers Union Ins. Cos. v. *Crow Tribe*, 471 U.S. 845 (1985) ..... *passim*
Nieman v. *NLO, Inc.*, 108 F.3d 1546 (6th Cir. 1997) 18

Cases—Continued: Page

Northeast Ohio Reg'l Sewer Dist. v. *Advanced Med. Sys., Inc.*, 666 N.E.2d 612 (Ohio Ct. App. 1995) 30
Northern States Power Co. v. *Prairie Island Mdewakanton Sioux Indian Community*, 991 F.2d 458 (8th Cir. 1993) 10
O'Conner v. *Commonwealth Edison Co.*, 13 F.3d 1090 (7th Cir. 1994), cert. denied, 512 U.S. 1222 (1994) 18
Oneida Indian Nation v *County of Oneida*, 414 U.S. 661 (1974) 14
Pacific Gas & Elec. Co. v. *State Energy Resources Conserv. & Dev. Comm'n*, 461 U.S. 190 (1983) 1
Phillips Petroleum Co. v. *Shutts*, 472 U.S. 797 (1985) 12
Reservation Tel. Coop. v. *Three Affiliated Tribes of the Fort Bethold Reservation*, 76 F.3d 181 (8th Cir. 1996) 11
Richards v. *United States*, 369 U.S. 1 (1962) 24
Roberts v. *Florida Power & Light Co.*, 146 F.3d 1305 (11th Cir. 1998), petition for cert. pending, No. 98-640 18
Santa Clara Pueblo v. *Martinez*, 436 U.S. 49 (1978) 8, 10
Silkwood v. *Kerr-McGee Corp.*, 464 U.S. 238 (1984) 17, 30
Spann v. *Colonial Village, Inc.*, 899 F.2d 24 (D.C. Cir. 1990) 21
Stibitz v. *General Pub. Utils. Corp.*, 746 F.2d 993 (3d Cir. 1984), cert. denied, 469 U.S. 1214 (1985) 17
Strate v. *A-1 Contractors*, 520 U.S. 438 (1997) 6, 8, 11, 12, 13, 20

Cases—Continued: Page

TMI Litig. Cases Consol. II, In re, 940 F.2d 832 (3d Cir. 1991), cert. denied, 503 U.S. 906 (1992) 17, 18, 19, 22, 23
Torres v. *Oakland Scavenger Co.*, 487 U.S. 312 (1988) 21
United States v. *American Ry. Express Co.*, 265 U.S. 425 (1924) 20, 21
United States v. *Plainbull*, 957 F.2d 724 (9th Cir. 1992) 10
United States v. *Yakima Tribal Court*, 806 F.2d 853 (9th Cir. 1986), cert. denied, 481 U.S. 1069 (1987) 25
Williams v. *Lee*, 358 U.S. 217 (1959) 8, 10
Young Radiator Co. v. *Celotex Corp.*, 881 F.2d 1408 (7th Cir. 1989) 21

Constitution, statutes and rules:

U.S. Const. Art. III 18
Atomic Energy Act of 1954, as amended by the Price-Anderson Act, 42 U.S.C. 2011 *et seq.* 1, 2
42 U.S.C. 2011 note 1
42 U.S.C. 2012(i) 2
42 U.S.C. 2013(c) 1
42 U.S.C. 2014(j) 3, 17
42 U.S.C. 2014(q) 2, 7, 26, 28
42 U.S.C. 2014(t) 2-3, 28, 29
42 U.S.C. 2014(w) 2, 7, 15, 26, 28
42 U.S.C. 2014(z) 2, 28
42 U.S.C. 2014(hh) ..... *passim*
42 U.S.C. 2073 2
42 U.S.C. 2093 2
42 U.S.C. 2111 2
42 U.S.C. 2131 *et seq.* 2
42 U.S.C. 2210 ..... *passim*
42 U.S.C. 2210(a) 2
42 U.S.C. 2210(b) 2
42 U.S.C. 2210(c) 2, 29

Statutes and rules—Continued: Page

42 U.S.C. 2210(d) 2
42 U.S.C. 2210(e) 3, 19, 29
42 U.S.C. 2210(e)(2) 3
42 U.S.C. 2210(i) 3
42 U.S.C. 2210(n) 3, 23
42 U.S.C. 2210(n)(1) 3, 19
42 U.S.C. 2210(n)(2) 3, 15, 17, 22, 24, 26, 28
42 U.S.C. 2210(n)(3) 3, 26, 28
42 U.S.C. 2210(n)(3)(A)(i) 28
42 U.S.C. 2210(n)(3)(A)(ii) 28
42 U.S.C. 2210(n)(3)(C)(vi) 3, 18
42 U.S.C. 2210(*o*) 3, 23
42 U.S.C. 2210(s) 3, 19, 29
Indian Civil Rights Act of 1968, 25 U.S.C. 1301 *et seq.* 10
Indian Tribal Justice Act, Pub. L. No. 103-176, 107 Stat. 2004 9
§ 2(5), 25 U.S.C. 3601(5) 9
§ 2(6), 25 U.S.C. 3601(6) 9
Labor-Management Relations Act, § 301, 29 U.S.C. 185 14
Outer Continental Shelf Lands Act, 43 U.S.C. 1331 *et seq.*:
§ 4(a)(2), 43 U.S.C. 1333(a)(2) 18
§ 23, 43 U.S.C. 1349(b)(1) 18
Price-Anderson Amendments Act of 1988, Pub. L. No. 100-408, 102 Stat. 1066 ..... 3, 17
Radiation Exposure Compensation Act, Pub. L. No. 101-426, § 5, 104 Stat. 922 (42 U.S.C. 2210 note) 4
28 U.S.C. 1331 9
28 U.S.C. 1441 25
28 U.S.C. 1442(a)(1) (Supp. II 1996) 25
28 U.S.C. 1446(d) 15, 25
Fed. R. App. P. 4(a)(3) 21
Sup. Ct. R. 15.2 26

Miscellaneous: Page

H.R. Conf. Rep. No. 383, 103d Cong., 1st Sess. (1993) 9
H.R. Rep. No. 104, 100th Cong., 1st Sess. (1987) 18, 19, 23
S. Rep. No. 296, 85th Cong., 1st Sess. (1957) 28, 29
S. Rep. No. 218, 100th Cong., 1st Sess. (1987) 17, 18-19, 23
S. Rep. No. 88, 103 Cong., 1st Sess. (1993) 9, 10, 22
14A C. Wright et al., *Federal Practice and Procedure* (1998 Supp.) 15

In the Supreme Court of the United States

OCTOBER TERM, 1998

No. 98-6

EL PASO NATURAL GAS COMPANY, ET AL., PETITIONERS

v.

LAURA NEZTSOSIE, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING REVERSAL

INTEREST OF THE UNITED STATES

The Secretary of Energy and the Nuclear Regulatory Commission (NRC) have responsibility for implementation of the Atomic Energy Act of 1954, of which the Price-Anderson Act is a part, and the United States has an interest in the efficient and equitable adjudication of nuclear liability claims. The United States also has an interest in the effectiveness of Indian tribal courts. See note 4, *infra*.

STATEMENT

1. The Atomic Energy Act of 1954, 42 U.S.C. 2011 *et seq.*, comprehensively regulates "the possession, use, and production of atomic energy and special nuclear material" for a range of military and commercial purposes, including the provision of nuclear power. 42 U.S.C. 2013(c).[1] In 1957, Con-

[1] Congress initially gave the Atomic Energy Commission (AEC) "exclusive jurisdiction to license the transfer, delivery, receipt, acquisition, possession, and use of nuclear materials." *Pacific Gas & Elec. Co.* v. *State Energy Resources Conserv. & Dev. Comm'n*, 461 U.S. 190, 207 (1983); see 42 U.S.C. 2011 *et seq.* Congress has since transferred the responsibilities of that agency to the newly formed Nuclear Regulatory Commission and Department of Energy. 42 U.S.C. 2011 note.

gress passed the Price-Anderson Act (Act), Pub. L. No. 85-256, 71 Stat. 576, as an amendment to the Atomic Energy Act. A major purpose of the Price-Anderson Act is to regulate the terms on which private industry may be held liable to members of the public for its role in the development of the Nation's atomic energy program. See 42 U.S.C. 2012(i); see generally *Duke Power Co.* v. *Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 63-67 (1978).

As amended over the years, the Price-Anderson Act establishes a system of private insurance, industry-wide financial support, and government indemnity to satisfy potential claims of "public liability," defined (with certain exceptions inapplicable here) as "any legal liability arising out of or resulting from a nuclear incident or precautionary evacuation." 42 U.S.C. 2014(w). The Act expansively defines "nuclear incident" to include "any occurrence, including an extraordinary nuclear occurrence, * * * causing bodily injury, sickness, disease, or death, or loss of or damage to property, or loss of use of property, arising out of or resulting from the radioactive, toxic, explosive, or other hazardous properties of source, special nuclear, or byproduct material." 42 U.S.C. 2014(q). "Source material" includes uranium and uranium ore. 42 U.S.C. 2014(z).

The Atomic Energy Act establishes a comprehensive licensing and contracting scheme for industrial and other uses of nuclear materials. See, *e.g.*, 42 U.S.C. 2073, 2093, 2111, 2131 *et seq.*, 2210(a)-(d). In turn, the Price-Anderson Act requires certain licensees (mainly those operating nuclear reactors), and authorizes the NRC to require other licensees, to maintain a specified amount of insurance from private sources. 42 U.S.C. 2210(a) and (b). The Act provides that the government will enter into indemnification agreements with certain licensees, both to ensure compensation for claims in the event that liability awards exceed the amount made available by private means, 42 U.S.C. 2210(c), and to channel all financial liability to the licensees, 42 U.S.C.

2014(t). The Act further establishes an aggregate limit on liability arising from a single "nuclear incident" in contexts where indemnification agreements are required, 42 U.S.C. 2210(e); bans any award of punitive damages in those contexts, 42 U.S.C. 2210(s); and, if aggregate liability exceeds the statutory limit for a particular nuclear incident, provides mechanisms to obtain additional funding and distribute it equitably, 42 U.S.C. 2210(e)(2), (i), and (*o*). The Act provides special liability rules for cases involving an "extraordinary nuclear occurrence," see 42 U.S.C. 2014(j), generally requiring defendants to waive certain defenses relating, *inter alia*, to fault and statutes of limitation. 42 U.S.C. 2210(n)(1).

In the Price-Anderson Amendments Act of 1988, Pub. L. No. 100-408, 102 Stat. 1066, Congress responded to serious litigation problems arising from the 1979 accident at the Three Mile Island nuclear power plant. See pp. 17-18, *infra*. The 1988 amendments provide, among other things, that "any suit asserting public liability" under any source of law "shall be deemed to be an action arising under" the Price-Anderson Act itself. 42 U.S.C. 2014(hh). They establish original and removal jurisdiction over such causes of action in the federal district courts, 42 U.S.C. 2210(n) and (*o*); provide mechanisms for consolidating claims arising from a single incident and for coordinating the orderly distribution of compensatory funds, 42 U.S.C. 2210(n)(2) and (3); and otherwise enable the federal courts to "encourage the equitable, prompt, and efficient resolution of cases arising out of the nuclear incident," 42 U.S.C. 2210(n)(3)(C)(vi).

2. Respondents are members of the Navajo Nation who have filed separate suits in Navajo tribal court alleging that, between the mid-1940s and the 1960s, petitioners (or their corporate affiliates) conducted tortious uranium mining activities on tribal lands leased from the Tribe. J.A. 76a-77a;

87a-88a n.5.[2] Respondents based their suits on theories of liability under tribal law. See Pet. 2-3; J.A. 81a. Petitioners moved in Navajo trial court to have the suits dismissed on jurisdictional grounds, and the motions were denied. See, *e.g.*, J.A. 63a-64a. Petitioners then filed these actions against respondents in the United States District Court for the District of Arizona, seeking declaratory and injunctive relief against further proceedings in tribal court. Pet. 2-4.

In November 1996, the district court entered separate orders providing essentially the same relief in each case. See J.A. 68a-73a. The court denied petitioners' application for a preliminary injunction, "except to the extent that [respondents] seek[] relief under the Price-Anderson Act in tribal court." J.A. 73a; see also J.A. 69a ("The Court does grant [El Paso's] requested relief to the extent that it enjoins [respondents] from pursuing a Price-Anderson Act complaint in tribal Court."), 71a (similar). The district court expressed no view concerning "whether or not the provisions of the [Act] have any application to the claims asserted by [respondents] in tribal court." J.A. 71a, 73a.

Petitioners filed a notice of appeal, but respondents did not, despite the preliminary injunction entered against them. A divided panel of the Ninth Circuit held that the tribal court exhaustion rule announced in *National Farmers Union Insurance Cos.* v. *Crow Tribe*, 471 U.S. 845 (1985), compelled the district court to stay its hand until after the Navajo court system had completed its inquiry into its jurisdiction over respondents' claims. See J.A. 92a. As relief, the majority not only affirmed the district court's refusal to enjoin respondents' prosecution of tribal law claims in tribal court, but also dissolved the injunction prohibiting them from pursuing Price-Anderson claims in that court, despite respondents' failure to challenge that injunction. *Ibid.* Judge Kleinfeld dissented, reasoning: "Because (1) it is law of the case, not appealed, that the tribal court lacks jurisdiction over Price-Anderson claims, and (2) there are no claims that can be made that are not Price-Anderson claims, it necessarily follows that (3) there are no claims that can be made in tribal court." J.A. 95a.

[2] Petitioners claim, and respondents appear not to dispute, that those activities were conducted under a license and contract with the AEC to supply uranium to the government. Pet. 2. Petitioners had entered into no indemnification agreements with the government. Pet. 10 n.9. In 1990, Congress created a federally administered fund to compensate, *inter alia*, certain persons employed in uranium mining in the Southwest between 1947 and 1971. Radiation Exposure Compensation Act, Pub. L. No. 101-426, § 5, 104 Stat. 922, 42 U.S.C. 2210 note. That legislation has no bearing on the questions presented here.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case implicates three separate issues. *First*, may the federal courts promptly resolve the parties' threshold dispute about whether respondents' tort claims fall within the preemptive scope of the Price-Anderson Act, even though that same dispute is currently presented in the tribal court proceedings (see J.A. 63a-64a)? *Second*, if the federal courts may conduct that threshold inquiry, do respondents' claims in fact fall within the Act's preemptive scope, such that they are "deemed to be [claims] arising under" the Act itself (42 U.S.C. 2014(hh))? *Third*, if respondents' claims do fall within that scope and are thus deemed to arise under the Act, should the federal courts enjoin the tribal court proceedings on the ground that tribal courts may not adjudicate *Price-Anderson claims* over the objection of the defendant? Only the first of those questions is properly before this Court.

1. The tribal exhaustion requirement of *National Farmers Union Insurance Cos.* v. *Crow Tribe*, 471 U.S. 845 (1985), does not bar prompt federal court review of whether a claim brought initially under tribal law in tribal court falls within the preemptive scope of the Price-Anderson Act. The reason is specific to the Act itself. Tribal courts retain broad jurisdiction over cases involving "nonmember conduct on

tribal land," *Strate* v. *A-1 Contractors*, 520 U.S. 438, 454 (1997), as distinguished from cases involving nonmember conduct on reservation lands alienated to non-Indians. The uranium mining at issue here occurred on tribal lands and thus falls within the heartland of tribal jurisdiction over "nonmember conduct." *Ibid.* The proper focus of this case, therefore, is not on the non-Indian identity of petitioners, but on the peculiar subject matter of respondents' claims.

Ordinarily, the plaintiff is master of what jurisdiction he will appeal to. A plaintiff is entitled to a state forum for the adjudication of most claims arising under state law, even where the defendant contends that federal law preempts those claims. A similar approach is warranted when a plaintiff chooses a tribal forum for the adjudication of claims arising under tribal law. A tribal court is competent to decide standard preemption *defenses*, and the exhaustion doctrine protects the federal courts from premature involvement in many ordinary disputes pending in tribal court.

The general rule making a plaintiff the master of his claim is, however, subject to an important exception, known as "complete preemption." Congress occasionally deems a defined class of common-law claims to be claims arising under federal law and entitles the *defendant* to choose a federal forum—not just for the ultimate adjudication of such claims on the merits, but also for the threshold inquiry into whether particular claims fall within the preempted class. The Price-Anderson Act is such a scheme. If respondents had sued in state court, therefore, petitioners would have been entitled to a federal forum for immediate resolution of whether respondents' tort claims fall within the class of claims "deemed to * * * aris[e] under" the Act. 42 U.S.C. 2014(hh). The specific and important statutory objectives underlying that guarantee of immediate federal court review take precedence over the usual exhaustion requirement and entitle a defendant to similarly prompt access to a federal forum when suit is brought in tribal court.

2. Because they mistakenly believed that the tribal exhaustion rule barred their consideration of the issue, neither the district court nor the court of appeals determined whether respondents' claims do, in fact, fall within the preemptive scope of the Price-Anderson Act. This Court need not itself resolve that issue on the merits; rather, if it agrees that the exhaustion requirement does not bar such review, it may remand to the lower federal courts for consideration of the issue in the first instance. In any event, the torts alleged here do constitute "nuclear incident[s]" as that term is broadly defined in 42 U.S.C. 2014(q), and respondents' claims are thus properly "deemed to * * * aris[e] under" the Act. 42 U.S.C. 2014(hh); see 42 U.S.C. 2014(w).

3. The final question potentially at issue is whether tribal courts may adjudicate claims deemed to arise under the Price-Anderson Act. That question is not properly before the Court. Respondents did not appeal the district court's preliminary injunction barring them from "seek[ing] relief under the Price-Anderson Act in tribal court." J.A. 73a. That default divests any reviewing court of jurisdiction to revisit whether respondents may now seek that very relief in tribal court. In any event, a basic purpose of the Price-Anderson Act is to ensure simplicity and efficiency in the litigation of nuclear tort claims by entitling defendants, upon their motion, to a single federal forum for the adjudication of all claims arising from any nuclear incident. That purpose would be thwarted if tribal courts, unlike state courts, could adjudicate such claims over the objection of the defendant.

ARGUMENT

A. The Tribal Exhaustion Doctrine Bars Premature Federal Intervention In Tribal Court Adjudication Of Ordinary Preemption Defenses

The issue in this case antecedent to all others is this: Does the usual tribal exhaustion requirement of *National Farmers Union Insurance Cos.* v. *Crow Tribe*, 471 U.S. 845

(1985), bar prompt federal court resolution of the parties' threshold dispute concerning whether respondents' claims fall within the preemptive scope of the Price-Anderson Act? The answer is no, and the reason relates to the extraordinary character of the Act's preemption provision, not to any general principle concerning tribal court jurisdiction over cases involving non-Indians.

1. A fundamental principle of federal Indian law is that tribal courts may exercise jurisdiction in cases involving non-Indians who "avail themselves of the substantial privilege of carrying on business on the reservation." *Merrion* v. *Jicarilla Apache Tribe*, 455 U.S. 130, 137 (1982) (internal quotation marks omitted).[3] Although this Court recently limited tribal jurisdiction over suits between non-Indians for events arising on reservation lands that have been alienated to non-Indians or to a State, see *Strate* v. *A-1 Contractors*, 520 U.S. 438 (1997), the Court "readily agree[d]" that "tribes retain considerable control over nonmember conduct on tribal land": *i.e.*, land owned by, or held in trust for, a Tribe or its members. *Id.* at 454. Here, petitioners conducted their mining activities on tribal lands (J.A. 87a-88a n.5), and the petition for certiorari presents no claim that this case raises the kind of territorial concerns at issue in *Strate*. See also *Merrion*, *supra* (Tribes retain sovereign authority to tax non-Indians doing business on leased tribal lands); *Kerr-McGee Corp.* v. *Navajo Tribe*, 471 U.S. 195 (1985) (applying *Merrion* to taxation of mineral production by non-Indians on leased Navajo lands). Those mining activities thus fall squarely within the class of cases in which tribal courts retain presumptive jurisdiction over "nonmember conduct."[4]

[3] See, *e.g.*, *Williams* v. *Lee*, 358 U.S. 217, 222-223 (1959) (tribal court had exclusive jurisdiction to adjudicate contract dispute brought by non-Indian against Indian, even though non-Indian had sued in state court; "[i]t is immaterial that respondent is not an Indian," because "[h]e was on the Reservation and the transaction with an Indian took place there"); *Kennerly* v. *District Court*, 400 U.S. 423 (1971) (per curiam) (following *Williams*); *Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49, 65 (1978) (tribal courts are "appropriate forums for the exclusive adjudication of disputes affecting important personal and property interests of both Indians and non-Indians"); *Iowa Mut. Ins. Co.* v. *LaPlante*, 480 U.S. 9, 18 (1987) ("[t]ribal authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty").

In *National Farmers Union*, this Court held that federal courts have jurisdiction under 28 U.S.C. 1331 to consider claims that federal law has "curtailed the power[] of [a] Tribe" to exercise jurisdiction over a defendant in a case pending in tribal court. 471 U.S. at 852. The Court further held, however, that a party may not obtain such relief until after it has exhausted its remedies in the tribal judicial system, a rule that the Court grounded in "a policy of supporting tribal self-government and self-determination," "the orderly administration of justice in the federal court," and the value of providing tribal courts with "the first opportunity to evaluate the factual and legal bases for the challenge." *Id.* at 856. The Court at the time anticipated three exceptions to the exhaustion rule: where the assertion of tribal jurisdiction is in "bad faith," where exhaustion would be "futile," and "where the action is patently violative of express jurisdictional prohibitions." *Id.* at 856 n.21. Subsequently, in *Iowa Mutual Ins. Co.* v. *LaPlante*, 480 U.S. 9

[4] Congress recently reaffirmed the United States' commitment to tribal courts by enacting the Indian Tribal Justice Act, Pub. L. No. 103-176, 107 Stat. 2004 (1993), which provides financial and institutional assistance to tribal justice systems throughout the United States. Congress predicated that legislation on its findings that "tribal justice systems are an essential part of tribal governments" and are "the appropriate forums for the adjudication of disputes affecting personal and property rights," 25 U.S.C. 3601(5) and (6); that "tribal courts are permanent institutions charged with resolving the rights and interests of both Indian and non-Indian individuals," S. Rep. No. 88, 103d Cong., 1st Sess. 8 (1993); and that "civil jurisdiction on an Indian reservation presumptively lies in tribal court, unless affirmatively limited by a specific treaty provision or federal statute," H.R. Conf. Rep. No. 383, 103d Cong., 1st Sess. 13 (1993) (internal quotation marks omitted).

(1987), the Court relied on the exhaustion doctrine in rejecting the efforts of a defendant in a pending tribal court case to use the diversity statute to secure a federal court judgment on the merits of a substantive issue pending in the tribal court.[5]

2. Like cases in state court, cases in tribal court often present issues about the preemptive effect of federal law on a plaintiff's cause of action. The assertion of a preemption *defense* is generally no basis for federal court intervention in tribal court proceedings. In the absence of a contrary congressional determination, tribal courts, no less than state courts, are presumed competent to decide questions of federal law, including preemption.[6] Indeed, in many contexts,

[5] Although substantive federal Indian law gives tribal courts exclusive jurisdiction over a variety of claims brought against Indians for events arising on a reservation, see, *e.g.*, *Williams* v. *Lee*, *supra*; see also *Santa Clara Pueblo*, 436 U.S. at 65, in our view the exhaustion doctrine does not itself rebut the ordinary rule that a plaintiff may select the forum in which suit will be filed. But cf. *United States* v. *Plainbull*, 957 F.2d 724 (9th Cir. 1992). Where a private plaintiff challenges an exercise of taxing or regulatory authority by the Tribe itself, however, we believe that the plaintiff ordinarily must first present its objections to the tribal administrative agency and then to the tribal court. See, *e.g.*, *Middlemist* v. *Babbitt*, 19 F.3d 1318 (9th Cir.), cert. denied, 513 U.S. 691 (1994); 94-42 *Middlemist* Gov't Br. in Opp. 6-12.

[6] See, *e.g.*, *Santa Clara Pueblo*, 436 U.S. at 65-66 (with narrow exceptions, tribal courts have exclusive jurisdiction to address preemptive effect of Indian Civil Rights Act on tribal law); compare *Northern States Power Co.* v. *Prairie Island Mdewakanton Sioux Indian Community*, 991 F.2d 458 (8th Cir. 1993) (holding that exhaustion would itself frustrate federal statutory purposes); see generally S. Rep. No. 88, *supra*, at 8-9. This Court has admonished that any concern about the competence of tribal courts to address general legal issues "is not among the exceptions to the exhaustion requirement established in *National Farmers Union*, 471 U.S., at 856, n. 21, and would be contrary to the congressional policy promoting the development of tribal courts." *Iowa Mutual*, 480 U.S. at 19; accord *id.* at 21 (opinion of Stevens, J.) ("A federal court must always show respect for the jurisdiction of other tribunals. Specifically, only in the most extraordinary circumstances should a federal court enjoin the conduct of litigation in a state court or tribal court.").

federal court adjudication of a preemption issue pending in tribal court could "render the exhaustion requirement virtually meaningless, allowing a tribal court to assert jurisdiction over an action only after a federal court had effectively determined the merits of the case." *Reservation Tel. Coop.* v. *Three Affiliated Tribes of the Fort Berthold Reservation*, 76 F.3d 181, 185 (8th Cir. 1996). Moreover, abandonment of the exhaustion requirement for cases involving standard preemption defenses would expose the federal courts to burdensome requests for premature intervention in many ordinary disputes arising in tribal courts. Cf. *National Farmer's Union*, 471 U.S. at 856-857.

Contrary to petitioners' suggestion (Pet. 13-16), tribal court adjudication of ordinary preemption defenses, in cases involving non-Indian conduct on tribal lands, is quite consistent with this Court's decision in *Strate*. That case concerned whether a tribal court had adjudicatory jurisdiction to hear a suit between non-Indians involving a traffic accident on a state highway within a reservation. The Court concluded that the state highway was jurisdictionally equivalent to land that the Tribe had alienated to non-Indians, 520 U.S. at 454-456, and it reaffirmed that, with certain important exceptions and in the absence of a contrary congressional direction, "Indian tribes lack civil authority over the conduct of nonmembers on non-Indian land within a reservation." *Id.* at 446 (citing *Montana* v. *United States*, 450 U.S. 544, 565-566 (1981)). The Court separately addressed the argument that a tribal court's adjudicatory jurisdiction over non-Indians might exceed the Tribe's "civil authority" (or "regulatory jurisdiction") over them, just as the constitutional restrictions on a State's power to impose substantive rules of conduct on nonresidents do not themselves limit the power of state courts to adjudicate disputes

between nonresidents under the laws of another State. See, *e.g.*, *Phillips Petroleum Co.* v. *Shutts*, 472 U.S. 797, 821-822 (1985). In rejecting that argument, the Court held that, "[a]s to nonmembers, * * * a tribe's adjudicative jurisdiction does not exceed its legislative jurisdiction." 520 U.S. at 453.

Petitioners mistakenly cite that passage for the proposition that exhaustion of remedies in the tribal judicial system is unnecessary when a defendant in a pending tribal court action contends that federal law has preempted a tribe's "legislative jurisdiction." Pet. 13, 16. As a preliminary matter, the logical consequences of that position would extend well beyond the exhaustion doctrine: the cited passage in *Strate* deals with jurisdiction, not exhaustion, and misapplication of that passage to the preemption setting would have odd and unfortunate jurisdictional effects. If federal preemption of tribal legislative jurisdiction deprived tribal courts of jurisdiction to hear a particular claim, tribal courts would lack jurisdiction to uphold preemption defenses on the merits; upon conducting the inquiry and finding preemption, the tribal court would be compelled to dismiss the relevant claim for lack of jurisdiction.

Strate does not compel such an anomalous regime. In rejecting the analogy to state court jurisdiction over nonresidents involving conduct outside the forum State, *Strate* addressed an issue that, in many respects, is appropriately compared to personal jurisdiction. The *Strate* Court's equation of adjudicative and legislative jurisdiction means that when a Tribe lacks a sufficient interest in non-Indian conduct outside tribal lands to regulate the conduct directly, it also lacks adjudicatory jurisdiction over cases arising from that same conduct. That holding, however, is irrelevant where, as here, the conduct arises on tribal lands and therefore falls squarely within the heartland of tribal sovereignty, subject only to the preemptive effect of a federal statute—applicable to Indians and non-Indians alike—governing the subject matter of the suit. See *Strate*, 520 U.S. at 454 (reaffirming

Tribes' "considerable control over nonmember conduct on tribal land"). Indeed, in this setting, it is inconsequential that the defendants in tribal court happen to be non-Indians. An Indian defendant could just as easily raise a federal preemption challenge to a tribal law claim brought in tribal court, and he would have no less an interest than a non-Indian defendant in its appropriate resolution.

Thus, if a tribal court otherwise has jurisdiction to hear a case (*e.g.*, because the conduct occurred on tribal land), any qualification of the tribal court's authority to decide a preemption defense on the merits, and to decide that issue in the first instance, cannot logically derive from the jurisdictional concerns underlying *Strate*.[7] Any such qualification must derive instead from the particular nature of the federal statutory scheme at issue.

B. The Exhaustion Doctrine Does Not Bar A Federal Court From Determining, In The First Instance, The Effect Of The Price-Anderson Act's Complete Preemption Scheme On Actions Pending In Tribal Court

1. In a suit brought in state court under state law, "[f]ederal pre-emption is ordinarily a federal *defense* to the plaintiff's suit. As a defense, it does not appear on the face of a well-pleaded complaint, and, therefore, does not authorize removal to federal court." *Metropolitan Life Ins. Co.* v. *Taylor*, 481 U.S. 58, 63 (1987) (emphasis added). Conse-

---

[7] In a concluding footnote, the *Strate* Court added that the exhaustion requirement is inapplicable when a federal court is asked to consider the validity of "tribal-court jurisdiction over an action such as this one," because adherence to that requirement would then serve "no purpose other than delay." 520 U.S. at 459-460 n.14. That footnote does not exempt from the exhaustion requirement all circumstances in which a federal court considers the proper resolution of a substantive issue pending in tribal court to be "clear." Cf. Pet. 14 & n.17. Instead, it indicates only that exhaustion is not required when, in cases presenting the territorial jurisdictional concerns at issue in *Strate*, a tribal court plainly lacks adjudicatory jurisdiction over the conduct of non-Indians on alienated land.

quently, ordinary preemption defenses must often be decided by state courts—even when the defendant would prefer to have a federal court decide the issue, even when the preemption defense is "obvious," *id.* at 66, and "even if both parties concede that the federal defense is the only question truly at issue," *Caterpillar Inc.* v. *Williams*, 482 U.S. 386, 393 (1987). As discussed, the same rule should apply to tribal court adjudication of an ordinary federal preemption defense to a cause of action arising under tribal law.

The preemption claim that petitioners raise, however, is not an ordinary preemption defense. "On occasion, the Court has concluded that the pre-emptive force of a [federal] statute is so extraordinary that it converts an ordinary state common-law complaint into one stating a federal claim for purposes of the well-pleaded complaint rule. Once an area of state law has been completely pre-empted, any claim purportedly based on that pre-empted state law is considered, from its inception, a federal claim, and therefore arises under federal law." *Caterpillar*, 482 U.S. at 393 (internal quotation marks and citation omitted) (addressing Section 301 of the Labor-Management Relations Act).[8]

The principal consequence of "complete preemption," as distinguished from ordinary preemption, is this: A defendant sued in state court may immediately remove the case to federal court; have the federal court resolve any dispute about whether the plaintiff's claims fall within the scope of the completely preemptive scheme; and, if they do, have the federal court adjudicate the case on the merits if the plaintiff elects to proceed (and can proceed) with claims under federal law. See *Caterpillar*, 482 U.S. at 391 n.4, 393-394; *Metropolitan Life*, 481 U.S. at 63-65.[9] Significantly, a defendant's right to immediate federal court resolution of a preemption claim depends not on whether that claim is "obvious[ly]" correct at the outset, see *Metropolitan Life*, 481 U.S. at 66, or even on whether it is ultimately meritorious, see, *e.g.*, *Caterpillar*, *supra*, but on whether it is a claim about complete, rather than ordinary, preemption. Where a federal statutory scheme creates a sphere of complete preemption, the federal court, upon removal, has sole authority to decide whether a state law claim falls within that sphere, and "the State court shall proceed no further unless and until the case is remanded." 28 U.S.C. 1446(d).

2. Congress has created only a few complete preemption regimes, and the Price-Anderson Act is among them. The Act provides that "*any* suit asserting public liability," as that term is defined in 42 U.S.C. 2014(w), "shall be deemed to be an action arising under" the Price-Anderson Act itself (42 U.S.C. 2014(hh)); that "the substantive rules for decision in such action shall be derived from the law of the State in which the nuclear incident involved occurs," but only if that law is consistent with the Act (*ibid.*); and that, "[u]pon motion of the defendant" or the NRC or the Secretary of Energy, "any such action pending in any State court * * * shall be removed or transferred to the United States district court" for "the district where the nuclear incident t[ook] place" (42 U.S.C. 2210(n)(2)).

---

[8] Accord *Metropolitan Life*, 481 U.S. at 65 (Employee Retirement Income Security Act); *Franchise Tax Bd.* v. *Construction Laborers Vacation Trust*, 463 U.S. 1, 24 (1983) (same); see also *Oneida Indian Nation* v. *County of Oneida*, 414 U.S. 661, 675 (1974).

[9] Some federal statutory schemes have that jurisdictional effect because they completely occupy the relevant field and create an alternative federal cause of action, even though they lack a provision explicitly deeming common law claims to be claims arising under federal law for purposes of the well-pleaded complaint rule. See generally *Caterpillar*, 482 U.S. at 393-394; 14A C. Wright *et al.*, *Federal Practice and Procedure* § 3722, at 86-87 (1998 Supp.). As discussed below, however, the Price-Anderson Act does have an explicit "deeming" provision, and it has completely preemptive effect for that reason alone.

For the moment, we leave to one side our answer as to whether this case in fact falls within the preemptive scope of Section 2014(hh). See pp. 26-30, *infra*. For present purposes, the important point is that for *some* class of claims brought initially under state law, the Price-Anderson Act converts those claims into "action[s] arising under" federal law. See pp. 17-18 & n.10, *infra*. As a result, if this suit had initially been brought in state court, petitioners would have been entitled (by removing the case) to an immediate determination by a federal court, rather than by the state court, of whether the suit falls within the preemptive scope of the Price-Anderson regime. That fact is highly relevant to the first question presented here: Does the rule announced in *National Farmers Union* foreclose prompt federal court resolution of the parties' dispute concerning whether respondents' claims fall within the Act's scope, even though the federal courts would immediately resolve that dispute if the case had been filed in state court?

The answer is no. Unlike the well-pleaded complaint rule governing the respective roles of state and federal courts, the tribal exhaustion doctrine arises "as a matter of comity, not as a jurisdictional prerequisite." *Iowa Mutual*, 480 U.S. at 16 n.8. That doctrine is rooted largely in a long-standing congressional "policy of supporting tribal self-government and self-determination," *National Farmers Union*, 471 U.S. at 856; see also *Iowa Mutual*, 480 U.S. at 16-17, and it is subject to complete defeasance by Congress. Although the jurisdictional roles of tribal and state courts may diverge in other contexts (see note 5, *supra*; note 13, *infra*), the role of state courts is an appropriate point of reference for determining the dimensions of the congressional policy favoring tribal sovereignty in the complete preemption setting. Where some particularized federal interest has prompted Congress to single out a subject matter for complete preemption, the courts should not lightly presume that Congress intended to make federal court review of the threshold

preemption question *less* available to tribal court defendants than to state court defendants. That, however, would be the peculiar consequence of applying the exhaustion doctrine here to bar prompt federal court review of that question. Forcing a federal court to "stay its hand" (*Iowa Mutual*, 480 U.S. at 16) when asked to decide a Price-Anderson preemption challenge would frustrate the core purposes of the Act, as we next discuss.

3. Until the 1988 amendments to the Price-Anderson Act, claims of injury due to "nuclear incidents" were brought under state law, although federal law preempted state law in important respects. See *In re TMI Litig. Cases Consol. II*, 940 F.2d 832, 857 (3d Cir. 1991) (*TMI II*), cert. denied, 503 U.S. 906 (1992); see also *Silkwood* v. *Kerr-McGee Corp.*, 464 U.S. 238, 251-256 (1984). Absent complete diversity, therefore, the federal courts lacked original jurisdiction to hear most such claims. See, *e.g.*, *Stibitz* v. *General Pub. Util. Corp.*, 746 F.2d 993 (3d Cir. 1984), cert. denied, 469 U.S. 1214 (1985); *Kiick* v. *Metropolitan Edison Co.*, 784 F.2d 490, 493 (3d Cir. 1986).

That jurisdictional impediment assumed particular importance after the nuclear incident at Three Mile Island in 1979, which gave rise to "150 separate cases against TMI defendants, with over 3,000 claimants, in various state and Federal courts." See S. Rep. No. 218, 100th Cong., 1st Sess. 13 (1987). There was then no mechanism for removing those cases to a single federal court. The then-existing removal and consolidation provisions of the Price-Anderson Act were confined to "extraordinary nuclear occurrences" (see 42 U.S.C. 2014(j)), and the NRC had not declared the Three Mile Island incident to be such an occurrence. The resulting proliferation of uncoordinated lawsuits led Congress to amend the removal and consolidation provisions to encompass cases arising out of any "nuclear incident." See 42 U.S.C. 2014(hh), 2210(n)(2). To ensure removability, Congress converted "*any* suit asserting public liability" for a

nuclear incident into "an action arising under" the Price-Anderson Act. 42 U.S.C. 2014(hh) (emphasis added).[10]

"By creating this federal program which requires the application of federal law," Congress sought to achieve "equity[] and efficiency in the disposition of public liability claims." *TMI II*, 940 F.2d at 857; accord 42 U.S.C. 2210(n)(3)(C)(vi) (encouraging "the equitable, prompt, and efficient resolution of cases arising out of [a] nuclear incident"). In particular, "[t]he availability of the provisions for consolidation of claims in the event of any nuclear incident, not just an [extraordinary nuclear occurrence], would avoid

[10] See *O'Conner* v. *Commonwealth Edison Co.*, 13 F.3d 1090, 1099-1100 (7th Cir.) (given "Congress' manifest intent to create a new and entirely federal cause of action," "a state cause of action is not merely transferred to federal court; instead, a new federal cause of action supplants the prior state cause of action"), cert. denied, 512 U.S. 1222 (1994); *TMI II*, 940 F.2d at 856 ("The Amendments Act [of 1988] creates a federal cause of action which did not exist prior to the Act."). Congress specifically intended to "mak[e] suits asserting public liability '[c]ases arising under the [l]aws of the United States' within the meaning of Article III," and it did so to ensure the adjudication of such suits in federal court. H.R. Rep. No. 104, 100th Cong., 1st Sess., Pt. 1, at 18 (1987) (House Report) (internal ellipsis omitted); accord S. Rep. No. 218, 100th Cong., 1st Sess. 13 (1987). In so doing, it followed aspects of the well-established jurisdictional model of the Outer Continental Shelf Lands Act (OCSLA), 43 U.S.C. 1333(a)(2), 1349(b)(1). House Report at 18; see generally *Gulf Offshore Co.* v. *Mobil Oil Corp.*, 453 U.S. 473 (1981) (discussing OCSLA jurisdictional scheme). The courts of appeals that have considered the issue have uniformly held that the Price-Anderson Act's conversion of nonfederal causes of action into removable federal causes of action is consistent with Article III, even though those federal causes of action incorporate substantive state law to the extent that it is consistent with federal law. See *O'Conner*, 13 F.3d at 1094-1101; *TMI II*, 940 F.2d at 848-860; *Nieman* v. *NLO, Inc.*, 108 F.3d 1546, 1548-1549 (6th Cir. 1997). (In addition to the provisions of the Price-Anderson Act itself, federal law often conflicts with, and takes precedence over, state law on such substantive issues as standard of care. See, *e.g.*, *Roberts* v. *Florida Power & Light Co.*, 146 F.3d 1305, 1308 (11th Cir. 1998), petition for cert. pending, No. 98-640 (filed Oct. 16, 1998); *O'Conner*, 13 F.3d at 1103-1105; *TMI II*, 940 F.2d at 859-860.) Respondents raised no Article III challenge in the court of appeals.

the inefficiencies resulting from duplicative determinations of similar issues in multiple jurisdictions that may occur in the absence of consolidation." S. Rep. No. 218, *supra*, at 13. Moreover, by creating centralized control over compensation funds, those same provisions also "ensur[e] the equitable and uniform treatment of all victims." H.R. Rep. No. 104, 100th Cong., 1st Sess., Pt. 3, at 30 (1987).

The statutory emphasis on "equity[] and efficiency" (*TMI II*, 940 F.2d at 857) would be compromised if tribal courts, unlike state courts, were immune from immediate federal court review of any threshold dispute concerning whether a plaintiff's claims fall within the completely preemptive scope of the Price-Anderson Act. Such review serves two principal objectives. First, in many contexts, prompt federal court resolution of the preemption question will foreclose uncoordinated litigation in disparate forums concerning whether the claims fall within the scope of the Act and its substantive rules, such as (where an indemnification agreement makes them applicable) the limits on compensatory liability or the ban on punitive damages. See 42 U.S.C. 2210(e) and (s); see also 42 U.S.C. 2210(n)(1) (foreclosing certain defenses in case of "extraordinary nuclear occurrence"); pp. 28-30, *infra*. Second, Congress anticipated that, upon finding that the Act applies, the federal court would itself promptly adjudicate the case on the merits. See pp. 22-25, *infra*.

Below, we address whether, unlike a state court, a tribal court may adjudicate claims "deemed to * * * aris[e] under" the Price-Anderson Act (42 U.S.C. 2014(hh)), even when the defendant would prefer a federal forum. Our central point here is simply that Congress had important, efficiency-based policy reasons for assigning to the federal courts the task of immediately resolving, in the first instance, whether a particular case falls within the scope of the Act's complete preemption provisions. Those efficiency concerns are applicable to suits filed in any non-federal court, not just those filed in state courts. This is therefore

one of those unusual circumstances, like the three anticipated in *National Farmers Union* itself (see 471 U.S. at 856 n.21), in which the ordinary exhaustion rule must yield to a supervening federal interest. It would make little sense to apply that "prudential rule" (*Strate*, 520 U.S. at 453) to foreclose the immediate federal court preemption review that, for highly specific reasons, Congress made available to any defendant sued in similar circumstances in state court.

4. In seeking an injunction in the district court against further tribal court proceedings, petitioners claimed not just that the Price-Anderson Act preempted respondents' tribal law claims and converted them into claims arising under the Act, but also that the tribal court lacks jurisdiction to adjudicate claims that *are* brought under the Price-Anderson Act (including claims that are brought under tribal law but are "deemed" to be claims arising under the Act). Our analysis to this point has not addressed the latter issue. We have detached that issue from the rest of our analysis not so much because it is analytically natural to do so as because this case arrives here in a very peculiar procedural posture. Respondents did not cross-appeal from the district court's preliminary injunction barring them from "seek[ing] relief under the Price-Anderson Act in tribal court." J.A. 73a; see also J.A. 69a, 71a. That default bars current appellate consideration of whether the injunction was proper.

a. When one party files a notice of appeal from a district court's judgment and the opposing party files no cross-appeal, "the appellee may not attack the decree with a view either to enlarging his own rights thereunder or of lessening the rights of his adversary." *United States* v. *American Ry. Express Co.*, 265 U.S. 425, 435 (1924) (Brandeis, J.). Although language in one early opinion suggested that this was a "rule of practice" rather than a strict jurisdictional prerequisite, see *Langnes* v. *Green*, 282 U.S. 531, 538 (1931), this Court has subsequently stated that the rule is "inveterate and certain," *Massachusetts Mut. Life Ins. Co.* v. *Ludwig*,

426 U.S. 479, 480 (1976), and that it defines "[t]he *power* of an appellate court to modify a decree," *Morley Constr. Co.* v. *Maryland Cas. Co.*, 300 U.S. 185, 187 (1937) (emphasis added). Indeed, permitting an appellee to challenge a district court judgment without having filed its own notice of appeal under Rule 4(a)(3) of the Federal Rules of Appellate Procedure would be "equivalent to permitting courts to extend the time for filing a notice of appeal" and would therefore contradict "the mandatory nature of the time limits contained in Rule 4." *Torres* v. *Oakland Scavenger Co.*, 487 U.S. 312, 315 (1988); see also *Budinich* v. *Becton Dickinson & Co.*, 486 U.S. 196, 203 (1988) ("the taking of an appeal within the prescribed time is mandatory and jurisdictional").[11]

For those reasons, the court of appeals lacked jurisdiction to vacate the district court's injunction barring respondents from "seek[ing] relief under the Price-Anderson Act in tribal court" (J.A. 73a), and any dispute about the validity of that injunction on the merits is not properly presented in this Court. Significantly, the question of the tribal court's authority to adjudicate Price-Anderson claims on the merits is not logically antecedent to (even though it is obviously

[11] In *Torres*, the Court held that, despite the "harshness" of the result (487 U.S. at 317), a failure to identify all parties in a notice of appeal is a "jurisdictional bar" to appellate relief for any omitted party (*id.* at 314). Most courts that have considered the issue in light of *Torres* have held that noncompliance with the cross-appeal requirement presents a jurisdictional bar to modification of the district court's judgment to the benefit of an appellee. See, *e.g.*, *Johnson* v. *Teamsters Local 559*, 102 F.3d 21, 29 (1st Cir. 1996); *Young Radiator Co.* v. *Celotex Corp.*, 881 F.2d 1408, 1416 (7th Cir. 1989). But see, *e.g.*, *Spann* v. *Colonial Village, Inc.*, 899 F.2d 24, 32 (D.C. Cir 1990) (R.B. Ginsburg, J.), cert. denied, 498 U.S. 980, 1046 (1990). To support its contrary position, the court of appeals in this case relied on precedent holding that a court may consider *issues* of comity not raised by the parties. J.A. 82a. But a court's power to address unraised issues in support of a judgment is distinct from, and has always exceeded, its power to grant unrequested relief. See generally *American Ry. Express*, 265 U.S. at 435; see also *Iowa Mutual*, 480 U.S. at 16 n.8 (tribal exhaustion doctrine is not "jurisdictional").

related to) the separate question that *is* presented here: the appropriateness of a prompt federal court inquiry into whether the purportedly tribal claims now pending in tribal court fall within the Act's complete preemption scheme to begin with. Indeed, the latter question may be antecedent to the former, for only if the federal court determines that these are in fact Price-Anderson Act claims would it become necessary to decide whether a tribal court may properly adjudicate them as such.

The procedural peculiarities of this case present an unfortunate jurisdictional barrier to full consideration of the issues that would otherwise be presented. But the court of appeals' most basic error was to act without jurisdiction. Correction of that error should take precedence over correction of any mistakes the court may have made after erroneously assuming jurisdiction.

b. The question on which respondents have defaulted is important. On the one hand, the Price-Anderson Act does not explicitly address tribal court jurisdiction over claims arising under the Act, nor does it provide for removal of Price-Anderson claims from tribal court to federal court. Compare 42 U.S.C. 2014(hh) (converting "any suit asserting public liability" into suit arising under Act) with 42 U.S.C. 2210(n)(2) (providing for removal only from "any * * * action pending in any State court"). As a general matter, "the proper inference from silence is that [a Tribe's] sovereign power remains intact." *Iowa Mutual*, 480 U.S. at 18 (internal ellipses omitted) (quoting *Merrion*, 455 U.S. at 149 n.14). Like state courts, tribal courts are courts of general subject-matter jurisdiction, and, where they have jurisdiction over the parties, they are presumed competent to adjudicate claims arising under any source of law, including federal law, in the absence of a contrary congressional determination. See generally S. Rep. No. 88, *supra*, at 8-9.

On the other hand, Congress's desire for "equity[] and efficiency in the disposition of public liability claims" (*TMI*

II, 940 F.2d at 857), and its creation of a complete preemption scheme to achieve those objectives, underscore an obvious intent to ensure, at the election of the defendant or the government, expeditious federal court review on the merits of *any* suit falling within the scope of the Price-Anderson Act. Evidence of that intent abounds throughout the Act. As we have discussed, Congress created a complete preemption regime in this context to expedite litigation concerning nuclear torts, to "avoid the inefficiencies resulting from duplicative determinations of similar issues in multiple jurisdictions that may occur in the absence of consolidation," S. Rep. No. 218, *supra*, at 13, and to give the federal courts centralized control over compensation funds to "ensur[e] the equitable and uniform treatment of all victims," H.R. Rep. No. 104, *supra*, Pt. 3, at 30. Without any mechanism for transfer from tribal to federal court, tribal court adjudication of claims arising from nuclear incidents would threaten to cause the very litigation problems that Congress sought to rectify: delay, uncoordinated litigation in disparate forums concerning the same underlying nuclear incident, and dispersal of related compensation claims. Indeed, a pervasive premise of the Act is that defendants may avoid such problems simply by seeking consolidated federal court review of all cases arising from a single incident. See, *e.g.*, 42 U.S.C. 2210(n) and (*o*).

Of course, not every case falling within the Act's preemptive scope will ultimately present each of those problems, because not every nuclear incident will give rise to multiple tort suits. Congress legislated with a broad brush, however, because it is often difficult to know in advance how many plaintiffs will eventually seek relief for radiation-related illnesses caused by a single nuclear incident. See *TMI II*, 940 F.2d at 856. Congress's decision to include *all* "nuclear incidents" within the Act's preemptive scope, and to guarantee a federal forum to any defendant sued within that scope, represents a considered preference for bright-line

rules in this area. That preference would be defeated if important jurisdictional decisions were to turn on litigation-intensive, case-by-case predictions in disparate forums about the potential for a particular nuclear incident to give rise to multiple tort suits.[12]

In sum, Congress anticipated only two forums for the adjudication of Price-Anderson claims, and they are the two forums that the Act explicitly addresses: federal courts and, subject to an absolute right of removal, state courts. See 42 U.S.C. 2210(n)(2). Tribal court adjudication of Price-Anderson claims, over the objection of the defendant and without any mechanism for removal, would contradict the structure and purposes of the Act. And application of the exhaustion rule to delay federal-court adjudication of the proper forum for Price-Anderson claims would itself contradict the Act's emphasis on efficiency and simplicity in nuclear tort litigation. Cf. *National Farmers' Union*, 471 U.S. at 856 n.21.

Because the Act is intended to ensure automatic adjudication of nuclear liability claims by the federal courts "[u]pon motion of the defendant" or the government (42 U.S.C. 2210(n)(2)), the Act might be read to confine jurisdiction over such claims to the federal and state courts. In our view, however, the rule favoring retained tribal sovereignty to the extent consistent with federal law (see *Merrion*, 455 U.S. at 149 n.14) supports a slightly different approach. The Act

[12] Although Congress created an exclusively federal cause of action for "any suit asserting public liability," it provided that "the substantive rules for decision in such action shall be derived from the law of the State in which the nuclear incident involved occurs," except where inconsistent with the Price-Anderson Act. 42 U.S.C. 2014(hh); see also note 10, *supra* (noting role of federal law in setting standard of care). Under one natural interpretation of that provision, tribal courts adjudicating Price-Anderson claims might need to apply state law in important respects. Cf. *Richards* v. *United States*, 369 U.S. 1 (1962). Because the statutory scheme provides for automatically divesting the state courts themselves of their role in applying state law, it would be somewhat anomalous to preserve for tribal courts a much larger role in applying that same state law.

preserves state court jurisdiction over Price-Anderson claims in the absence of any request for removal. Similarly, the exercise of tribal court jurisdiction over such claims comes into clear conflict with federal law when, and only when, the defendant (or the government) seeks, but cannot obtain, a federal forum. In those circumstances, just as a defendant resisting state court jurisdiction may obtain immediate removal to a federal forum for adjudication of the case on the merits, a defendant resisting tribal court jurisdiction over Price-Anderson claims should be entitled, upon serving notice in the tribal court, cf. 28 U.S.C. 1446(d), to seek prompt injunctive relief in federal court, if necessary, on the ground that further proceedings in tribal court would be inconsistent with the Act. Cf. *National Farmers Union*, 471 U.S. at 850-853. The plaintiffs who had brought the claims would be free to refile them in federal court.[13]

[13] Our conclusions concerning the role of tribal courts in adjudicating Price-Anderson claims derive from the strength and specificity of the policy objectives underlying Congress's decision to ensure the availability of federal court review in the nuclear tort context. Adoption of our analysis would not require the Court to address the role of tribal courts in deciding federal causes of action generally, even though, if brought in state court, virtually any federal cause of action may be removed to federal court. See 28 U.S.C. 1441. Particularly when compared to the compelling purposes underlying the removal provisions of the Price-Anderson Act, "the underlying purposes of Congress in providing for federal question removal jurisdiction remain somewhat obscure." *Boys Markets, Inc.* v. *Retail Clerks Union*, 398 U.S. 235, 246 (1970). Similarly, as this Court has recognized, general principles of federal court diversity jurisdiction have little bearing on tribal court adjudicatory authority. See *Iowa Mutual*, 480 U.S. at 16-18. Suits against federal officers in tribal court raise a separate set of concerns involving not just interpretation of the provision specifically providing for the removal of suits in state court against such officers (28 U.S.C. 1442(a)(1) (Supp. II 1996)), but also principles of comity between the national and dependent sovereigns. Compare *United States* v. *Yakima Tribal Court*, 806 F.2d 853 (9th Cir. 1986), cert. denied, 481 U.S. 1069 (1987), with *Becenti* v. *Vigil*, 902 F.2d 777, 779-780 (10th Cir. 1990).

C. Respondents' Tribal Law Claims Fall Within The Preemptive Scope Of The Price-Anderson Act.

Respondents argued below that the Price-Anderson Act "has no application whatsoever to the case at bar." Appellees' Joint C.A. Br. 23. They reasoned that petitioners had entered into no relevant indemnification agreement with the Atomic Energy Commission when conducting the mining activities at issue; that the term "nuclear incident," as defined in 42 U.S.C. 2014(q), encompasses only those "incidents" that implicate such indemnification agreements; that the claims here are therefore not claims for "public liability," as that term is defined in 42 U.S.C. 2014(w); and that these are therefore not "public liability action[s]" to which the Act's preemption provisions apply, see 42 U.S.C. 2014(hh), 2210(n)(2) and (3). We disagree.

1. As an initial matter, we do not believe that resolution of this case compels this Court to decide, on the merits, whether the absence of an indemnification agreement removes respondents' claims from the scope of the Price-Anderson Act—an issue that the court of appeals did not reach (see J.A. 92a n.7) and, notably, does not appear in respondents' brief in opposition to the petition for certiorari. Cf. Sup. Ct. R. 15.2. The question presented in this case is whether the tribal exhaustion doctrine bars immediate federal court review of the Act's preemptive effect (if any) on respondents' claims under tribal law. The reason the answer to that question is no is *not* that petitioners' preemption argument is correct on the merits (although we believe it is), but because it is an argument about complete preemption under the Price-Anderson Act, rather than an ordinary preemption defense under some other federal statute.

When a state court defendant cites federal preemption as a basis for removal, a federal court may decide the preemption question in the first instance if the question concerns whether a claim falls within the scope of a completely preemptive scheme (whether or not the answer is obvious), and

may not do so if the question concerns whether the claim falls within the scope of an ordinary preemption defense (again, whether or not the answer is obvious). See *Metropolitan Life*, 481 U.S. at 66. If the issue is one of complete preemption, the court simply conducts the inquiry and then, depending on the outcome, either does or does not remand the case to state court. A similar approach is appropriate when the suit is initially brought in tribal court. The special features of the Price-Anderson Act that make the ordinary exhaustion rules inapplicable do not turn on whether, in a particular case, the federal court ultimately finds that the tribal claims at issue fall within the preemptive scope of that Act. If the court is uncertain at the outset whether the claims do fall within that scope, the proper and efficient course is not to abstain from making the inquiry, but to conduct the inquiry and, if complete preemption is found, to enjoin the proceedings in tribal court.

In this case, *no* federal court has yet addressed whether respondents' tribal law claims fall within the preemptive scope of the Act. Like the district court (J.A. 71a, 73a), the court of appeals mistakenly held that the tribal exhaustion doctrine foreclosed any consideration of that substantive preemption question. J.A. 92a n.7. If this Court reverses on the threshold exhaustion issue, one appropriate disposition is thus simply to remand the case to the lower courts for consideration, in the first instance, of the parties' dispute about whether these claims fall within the Act's preemptive scope.

2. In any event, we disagree with the position, advanced by respondents below, that the Act's preemption provisions are inapplicable in the absence of an indemnification agreement. The Act preempts, and "deem[s] to be an action arising under" federal law, any "public liability action," which the Act defines as "any suit asserting public liability." 42

U.S.C. 2014(hh).[14] "Public liability"—so named because it involves liability to (not of) the public[15]—is broadly defined to include "any legal liability arising out of or resulting from a nuclear incident." 42 U.S.C. 2014(w). In turn, "nuclear incident" is defined to include "any occurrence, including an extraordinary nuclear occurrence, * * * causing * * * bodily injury, sickness, disease, or death * * * arising out of or resulting from the radioactive, toxic, explosive, or other hazardous properties of source, special nuclear, or byproduct material." 42 U.S.C. 2014(q); see also 42 U.S.C. 2014(z) (defining "source material" to include "uranium"). Nowhere does the Act make the existence or nonexistence of an indemnification agreement relevant to whether a nonfederal claim falls within the scope of a "public liability action" for purposes of the removal and preemption provisions.[16]

---

[14] Section 2014(hh) defines the term "public liability action" "as used in section 2210." The term appears in only two places in Section 2210. First, it appears in the removal and consolidation provision of Section 2210(n)(2), which makes no reference to indemnification agreements at all. The term also appears, by cross-reference to Section 2210(n)(2), in Section 2210(n)(3). That provision cites certain circumstances involving indemnification agreements as included within a larger class of circumstances in which a district court is authorized to appoint a "special caseload management panel." See 42 U.S.C. 2210(n)(3)(A)(i) and (ii). Nothing in Section 2210(n)(2) or Section 2210(n)(3) suggests that the removal and consolidation provisions are applicable only where there is an underlying indemnification agreement.

[15] See, *e.g.*, S. Rep. No. 296, 85th Cong., 1st Sess. 8 (1957) (discussing efforts to "determine the amount of financial protection which the licensee for reactors must have to protect the public against nuclear incidents"); *id.* at 15 (term "financial protection" is "defined to mean the ability to respond in damages for public liability"); *id.* at 17 (term "public liability" means "a legal liability arising out of, or resulting from, a nuclear incident"); *id.* at 18 (discussing "damage to the public").

[16] The Act defines "person indemnified" to include, *inter alia*, the following: "with respect to a nuclear incident occurring within the United States or outside the United States as the term is used in section 2210(c) of this title, * * * the person with whom an indemnity agreement is executed or who is required to maintain financial protection, and any other person who may be liable for public liability." 42 U.S.C. 2014(t). That definition is written broadly to "protect[] the public" in case a third party, rather than "the person with whom the indemnity agreement is executed," causes a nuclear incident at a regulated facility: *e.g.*, where "some unusual incident, such as negligence in maintaining an airplane motor, should cause an airplane to crash into a reactor." See, *e.g.*, S. Rep. No. 296, *supra*, at 17. Under any reasonable definition, however, the term does not embrace contexts in which *no one* has an indemnification agreement with the government. The term itself, and its use elsewhere in the Act, presuppose the existence of some relevant person appropriately identified as "the person with whom an indemnity agreement is executed." 42 U.S.C. 2014(t); see, *e.g.*, 42 U.S.C. 2210(c). Here, petitioners have no indemnity agreement with the government, and therefore, as they have acknowledged, "El Paso's and Cyprus' claims are not subject to federal indemnification." Pet. 10 n.9; see also *Lane* v. *Peña*, 518 U.S. 187, 192 (1996) ("a waiver of the Government's sovereign immunity will be strictly construed, in terms of its scope, in favor of the sovereign").

In contrast, many of the Act's other important provisions —such as the damages cap (42 U.S.C. 2210(e)) and the ban on punitive damages (42 U.S.C. 2210(s))—specifically provide, on their face, that they apply only in contexts involving indemnification agreements.[17] That is further reason not to read a similar limitation into the provisions at issue here. It is true that, when Congress originally passed the Price-Anderson Act in 1957, it was chiefly concerned with nuclear liability in the particular contexts in which defendants would have entered into indemnification agreements with the government. See, *e.g.*, S. Rep. No. 296, 85th Cong., 1st Sess. 16-18 (1957). And it is also true that, before the 1988 amendments, the Act itself (as distinguished from federal regulation generally (see note 10, *supra*)) had little substantive significance for cases in which the defendant had no such

---

[17] In so providing, those provisions use language confirming that the term "nuclear incident" is *not* confined to cases involving indemnification agreements. See, *e.g.*, 42 U.S.C. 2210(s) ("No court may award punitive damages in any action with respect to a nuclear incident or precautionary evacuation against a person on behalf of whom the United States is obligated to make payments under an agreement of indemnification covering such incident or evacuation.").

agreement. By their terms, however, the preemption, removal, and consolidation provisions resulting from the 1988 amendments extend to all cases involving "nuclear incidents," as broadly defined by the Act, whether or not the defendant has an indemnification agreement with the government.[18] The plain language of those provisions is dispositive, even though it embraces a larger class of nuclear liability cases than the particular subclass with which Congress was most acutely concerned. See *Brogan* v. *United States*, 118 S. Ct. 805, 809 (1998) ("[I]t is not, and cannot be, our practice to restrict the unqualified language of a statute to the particular evil that Congress was trying to remedy.").

CONCLUSION

The judgment of the court of appeals should be reversed.

[18] See *Kerr-McGee Corp.* v. *Farley*, 115 F.3d 1498, 1504 (10th Cir. 1997), cert. denied, 118 S. Ct. 880 (1998); see also *Gassie* v. *SMH Swiss Corp.*, No. Civ. A. 97-3557, 1998 WL 71647 (E.D. La. Feb. 17, 1998) (unreported); *Northeast Ohio Reg'l Sewer Dist.* v. *Advanced Med. Sys., Inc.*, 666 N.E.2d 612 (Ohio Ct. App. 1995); cf. *In re Cincinnati Radiation Lit.*, 874 F. Supp. 796, 832 (S.D. Ohio 1995). But see *Gilberg* v. *Stepan Co.*, No. Civ. A. 98-139, 1998 WL 565978 (D.N.J. Aug. 20, 1998) (magistrate judge decision). Respondents contended below that, in a footnote in *Silkwood*, 464 U.S. at 252 n.12, this Court suggested that the Act does not "apply" in the absence of an indemnification agreement. As the Tenth Circuit observed in *Kerr-McGee* (115 F.3d at 1504), however, that footnote holds only that the Act's *liability limitation* provisions were inapplicable in *Silkwood* because the defendant had no indemnification agreement. The applicability of the Act's new preemption and removal provisions was, of course, not at issue, because *Silkwood* was decided before the 1988 amendments.

Respectfully submitted.

JOHN D. LESHY
Solicitor
Department of the Interior

MARY ANNE SULLIVAN
General Counsel
Department of Energy

JOHN F. CORDES
Solicitor
Nuclear Regulatory Commission

SETH P. WAXMAN
Solicitor General

LOIS J. SCHIFFER
Assistant Attorney General

EDWIN S. KNEEDLER
Deputy Solicitor General

JONATHAN E. NUECHTERLEIN
Assistant to the Solicitor General

MARTIN W. MATZEN
ETHAN G. SHENKMAN
Attorneys

DECEMBER 1998

No. 98-6 (4)

Supreme Court, U.S.
FILED
DEC 7 1998
CLERK

In The

Supreme Court of the United States

October Term, 1998

EL PASO NATURAL GAS COMPANY, a Delaware Corporation; CYPRUS FOOTE MINERAL COMPANY, a Pennsylvania Corporation; and CYPRUS AMAX MINERALS COMPANY, a Delaware Corporation,

Petitioners,

v.

LAURA NEZTSOSIE; ARLINDA NEZTSOSIE; and ZONNIE MARIE DANDY RICHARDS, Individually and as Representative of the Estate of Harold J. Richards, Sr.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF AMICUS CURIAE INTERSTATE NATURAL GAS ASSOCIATION OF AMERICA IN SUPPORT OF REVERSAL

JAMES W. MCCARTNEY
Counsel of Record
3007 First City Tower
1001 Fannin Street
Houston, Texas 77002-6760
(713) 758-2324 (telephone)
(713) 615-5113 (fax)

RICHARD H. PAGE
VINSON & ELKINS L.L.P.
2300 First City Tower
1001 Fannin Street
Houston, Texas 77002-6760
(713) 758-2602 (telephone)
(713) 615-5625 (fax)

JOAN DRESKIN
General Counsel
Interstate Natural Gas Association of America
10 G Street, N.E., Suite 700
Washington, D.C. 20002
(202) 216-5928 (telephone)
(202) 216-0876 (fax)

Attorneys for Amicus Curiae Interstate Natural Gas Association of America

December 4, 1998

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

20 pp

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

INTEREST OF THE AMICUS CURIAE 1

SUMMARY OF ARGUMENT 3

ARGUMENT 5

I. *NATIONAL FARMERS UNION* AND *IOWA MUTUAL* SHOULD BE OVERRULED TO THE EXTENT THAT THEY REQUIRE A CHALLENGE TO TRIBAL COURT JURISDICTION TO BE DECIDED IN THE FIRST INSTANCE BY TRIBAL COURTS 6

II. THE TRIBAL EXHAUSTION DOCTRINE DOES NOT APPLY TO FEDERAL PREEMPTION OR TO OTHER GATEKEEPING MATTERS NOT DEPENDENT ON TRIBAL LAW 11

III. INDIAN TRIBES ARE NOT EXEMPT FROM IMPLICIT PREEMPTION BY COMPREHENSIVE FEDERAL REGULATORY ACTION 14

CONCLUSION 16

TABLE OF AUTHORITIES

Page

CASES

Colorado River Water Conservation Dist. v. United States, 424 U.S. 800 (1976) 6, 9

Crawford v. Genuine Parts Co., 947 F.2d 1405 (9th Cir. 1991), *cert. denied*, 502 U.S. 1096 (1992) 9

Fidelity Fed. Sav. & Loan Ass'n v. De La Cuesta, 458 U.S. 141 (1982) 13

Iowa Mutual Ins. Co. v. LaPlante, 480 U.S. 9 (1987)...*passim*

Kerr-McGee Corp. v. Farley, 115 F.3d 1498 (10th Cir. 1997), *cert. denied*, 118 S. Ct. 880 (1998) 3

Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc., 118 S. Ct. 1700 (1998)..... 10

Montana v. United States, 450 U.S. 544 (1981) .. 8, 10, 12

Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp., 460 U.S. 1 (1983).....6, 9

National Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845 (1985)..... *passim*

Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978).....7, 8

Schneidewind v. ANR Pipeline Co., 485 U.S. 293 (1988).....2, 13, 15

Strate v. A-1 Contractors, 520 U.S. 438 (1997)..... *passim*

Tamiami Partners, Ltd. v. Miccosukee Tribe of Indians, 999 F.2d 503 (11th Cir. 1993)..... 11

TABLE OF AUTHORITIES – Continued

Page

STATUTES

15 U.S.C. § 717 et seq. (1994)..... 1

15 U.S.C. § 717u (1994)..... 2

21 U.S.C. § 360k(a) (1994)..... 14

25 U.S.C. §§ 1301-03 (1994) 9

49 U.S.C. §§ 1671, 1672(a) (1994)..... 14

OTHER

Laurie Reynolds: *Exhaustion of Tribal Remedies: Extolling Tribal Sovereignty While Expanding Federal Jurisdiction*, 73 N.C. L. REV. 1089 (1995) 11

Blake A. Watson, *The Curious Case of Disappearing Federal Jurisdiction over Federal Enforcement of Federal Law: A Vehicle for Reassessment of the Tribal Exhaustion/Abstention Doctrine*, 80 MARQ. L. REV. 531 (1997) 11

INTEREST OF THE AMICUS CURIAE[1]

The Interstate Natural Gas Association of America ("INGAA") is a non-profit association primarily of interstate natural gas transmission companies regulated by the Federal Energy Regulatory Commission ("FERC") under the Natural Gas Act ("NGA").[2] Most of its members are natural gas companies that operate under and subject to the comprehensive federal regulatory scheme provided by the NGA and the FERC regulations promulgated thereunder.[3] These member pipelines have facilities throughout the United States and conduct operations under certificates of public convenience and necessity issued by the FERC and its predecessor, the Federal Power Commission ("FPC"), pursuant to § 7 of the NGA. These companies operate approximately 200,000 miles of natural gas pipelines in the United States and account for more than 90% of all natural gas transported and sold in interstate commerce.

---

[1] No counsel for any party authored this brief in whole or in part. No person or entity other than INGAA and its members assisted financially in the preparation and submission of the brief. Petitioner El Paso Natural Gas Company is a member of INGAA in its capacity as a natural gas company, but not as to the uranium mining activities that form the basis for Respondents' claims on the merits. El Paso Natural Gas Company did not assist financially in the preparation or submission of the brief.

[2] 15 U.S.C. § 717 et seq. (1994).

[3] INGAA's members include thirty U.S. interstate pipelines, six Canadian interprovincial pipelines, and thirteen international pipeline companies.

There are more than 55 million acres of Indian land in the United States.[4] As a matter of geographical imperative, many interstate gas pipelines are required to cross Indian land in providing the interstate service authorized and approved by the FERC and the FPC. As a consequence of this proximity, controversies may arise between the pipeline companies and the various Indian tribes or their members. Accordingly, issues of federal Indian law – and particularly those relating to the jurisdictional authority of Indian tribes vis-a-vis non-Indians – are important to INGAA.

The decision by the Ninth Circuit below mandates deferral to tribal court authority and does so despite the fact that Congress has expressly decided that the claims arise under federal law only. The NGA, like the Price Anderson Act involved in this case, is broadly preemptive and interposes a uniform federal regulatory scheme.[5] Although many controversies involving INGAA's member pipelines are expressly subject to exclusive federal court jurisdiction under § 22 of the NGA,[6] other disputes arising from pipeline operations or the presence of facilities and personnel within Indian reservations and other Indian lands can implicate issues beyond § 22. As to those disputes, the Ninth Circuit's decision is potentially troublesome.

---

[4] *See* Annual Report of Indian Lands, BIA web site (http://www.doi.gov/bia/realty/consol.html).

[5] *See Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293 (1988).

[6] 15 U.S.C. § 717u (1994).

INGAA's interest is in ensuring immediate access to federal court for its pipeline company members and in preserving preemption concepts with respect to the NGA as well as the areas of "exclusive jurisdiction" identified in § 22 of the NGA. The decision below is regarded as significant to its member pipelines, and INGAA urges reversal.

SUMMARY OF ARGUMENT

This case provides the opportunity not only to clarify, but to correct this Court's decisions in *National Farmers Union*[7] and *Iowa Mutual*.[8] The Ninth Circuit read those decisions to require non-tribal members to incur the expense and delay associated with tribal exhaustion unless there was an "express jurisdictional prohibition" against tribal court jurisdiction.[9] It seems clear, especially in view of this Court's recent decision in *Strate*,[10] that a rule that is "prudential" is not so rigid and unyielding as the Ninth Circuit believed.[11]

---

[7] *National Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845 (1985).

[8] *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9 (1987).

[9] 136 F.3d 610, 617.

[10] *Strate v. A-1 Contractors*, 520 U.S. 438 (1997).

[11] The Tenth Circuit appears to interpret *National Farmers Union* and *Iowa Mutual* in the same manner as does the Ninth Circuit. *See Kerr-McGee Corp. v. Farley*, 115 F.3d 1498 (10th Cir. 1997), *cert. denied*, 118 S. Ct. 880 (1998). These two circuits account for most of the Indian law cases in the federal court system.

It appears to INGAA that the essential question is which forum – federal court or tribal court – should as a matter of common sense and reasonable respect to tribal authority decide in the first instance whether the tribal court has jurisdiction over non-tribal members. Because that question is strictly one of federal law and not tribal law, INGAA submits that federal courts are best equipped to decide that question.

Additionally, where federal preemption exists with respect to state regulatory authority, preemption must likewise exist with respect to tribal regulatory authority. Because, as *Strate* teaches, tribal court jurisdiction is confined by the extent of tribal regulatory jurisdiction and because preemption is exclusively an issue of federal law, such matters should be addressed by the federal courts. In preemption situations, it seems "plain" as this court said in *Strate*, that federal law supplants both state and tribal law so that no preliminary referral to tribal courts should be required. It would be difficult to envision congressional intent to *exclude* the states but *include* the tribes. This Court would not refer federal preemption issues to the state courts. Nor is any jurisprudential purpose served by referring such matters to tribal courts. To the extent that Indian tribes wish to advance their views, intervention or the submission of *amicus curiae* briefs by the Indian tribes or by the United States is an available vehicle to have those views presented and addressed.

ARGUMENT

Petitioners argued below that the claims asserted by Respondents in tribal court were preempted by federal law under the Price-Anderson Acts and, therefore, that the tribal court lacked jurisdiction. The Ninth Circuit did not decide the preemption issue. Instead, the court held that, under the tribal exhaustion doctrine of *National Farmers Union* and *Iowa Mutual*, challenges to tribal court jurisdiction must initially be decided in tribal court. Accordingly, Petitioners were left to take up their arguments regarding jurisdiction and preemption in tribal court.

INGAA submits that the Ninth Circuit's decision should be reversed. First, to the extent *National Farmers Union* and *Iowa Mutual* require that challenges to tribal court jurisdiction be initially resolved in tribal court, those decisions should be overruled. Such jurisdictional challenges should be decided in federal court at the outset, without any requirement of tribal exhaustion. Second, even if *National Farmers Union* and *Iowa Mutual* are not overruled, this Court's decision in *Strate* teaches that, in the circumstances present here, the tribal exhaustion doctrine does not apply. The courts below should have reached the preemption issue and should not have required exhaustion of tribal court remedies.

I. *NATIONAL FARMERS UNION* AND *IOWA MUTUAL* SHOULD BE OVERRULED TO THE EXTENT THAT THEY REQUIRE A CHALLENGE TO TRIBAL COURT JURISDICTION TO BE DECIDED IN THE FIRST INSTANCE BY TRIBAL COURTS

The tribal exhaustion doctrine, to state it simply, holds that a challenge to tribal court jurisdiction over non-Indians (or other non-tribal members) should, in the ordinary case, be heard in the first instance by the tribal court. The effect of the doctrine is that federal courts, having undoubted jurisdiction over that challenge, must forego (or at least postpone) the exercise of that jurisdiction, and this despite their "virtually unflagging obligation to exercise the jurisdiction given them." *See Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 15 (1983); *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976).

INGAA respectfully submits that federal courts are better able to decide this federal question[12] than are the tribal courts; that challenges to tribal court jurisdiction should be decided in federal court without prior deferral to tribal court. There are approximately 550 Indian tribes, including Alaska villages, recognized by the Bureau of Indian Affairs ("BIA").[13] Their associated reservation

---

[12] *See National Farmers Union*, 471 U.S. at 852 ("the question whether an Indian tribe retains the power to compel a non-Indian property owner to submit to the civil jurisdiction of a tribal court is one that must be answered by reference to federal law").

[13] *See* BIA web site (http://www.doi.gov/bia/tribes/telist97.html).

holdings vary in size from less than 100 acres to more than 16 million acres in the case of the Navajo Nation. While no officially-published information exists in the BIA, responses to informal inquiries to the BIA indicate that there are more than 150 tribal court systems of varying formality and cultural attributes.[14] With the great number of tribes and tribal court systems, it cannot reasonably be assumed that the tribal court systems will develop a uniform set of decisions on tribal court jurisdiction to assist the federal courts. *Cf. National Farmers Union*, 471 U.S. at 857.[15]

It may be accepted that, of the various Indian tribes, the Navajo Nation has a court system most like the federal system. However, the policy language of *National Farmers Union* and *Iowa Mutual* makes no distinction among tribal court systems, nor would distinctions be consistent with the stated rationale of advancing tribal self-government and self-determination. Even under the most sophisticated tribal court system, however, it would not be possible to say with any reasonable assurance that the tribal court, or indeed any other court, can better interpret this Court's controlling decisions on tribal court

---

[14] In *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 196 n.7 (1978), the Court referred to the fact that there were then 127 tribal court systems of varying types.

[15] *See National Farmers Union*, 471 U.S. at 855-56 ("the existence and extent of a tribal court's jurisdiction will require a careful examination of tribal sovereignty, the extent to which that sovereignty has been altered, divested, or diminished, as well as a detailed study of relevant statutes, Executive Branch policy as embodied in treaties, and administrative or judicial decisions").

jurisdiction than can a federal court. Under these circumstances, the question of tribal court jurisdiction over non-tribal members should not *per se* be remitted to tribal courts.

The jurisdiction question is not one in which the Indian tribes and their courts can be said to be free from interest. The scope of tribal court jurisdiction over non-tribal members is inextricably linked to notions of tribal sovereignty, and the tribes are understandably not disinterested in that regard. Accordingly, in deciding this jurisdiction question, INGAA suggests that it is more appropriate for the tribes to assume a position of advocacy – and thus inform the debate in that role – than to function in the role of a deliberative judicial body.

To a great degree, the explanations proffered for the tribal exhaustion doctrine seem to beg the jurisdictional question. For example, *Iowa Mutual* suggests that exhaustion avoids "infring[ing] upon tribal law-making authority," reasoning that "tribal courts are best qualified to interpret and apply tribal law." 480 U.S. at 16. But the challenge to tribal court jurisdiction implicates a question of federal law; it does not involve the interpretation or application of tribal law. *National Farmers Union*, 471 U.S. at 852. Federal judges, as compared to their tribal court counterparts, are better able to interpret and apply this Court's controlling decisions in *Strate*, *Montana*,[16] *Oliphant*,[17] *National Farmers Union*, *Iowa Mutual*, and the

[16] *Montana v. United States*, 450 U.S. 544 (1981).

[17] *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978).

like. Because the issue to be decided is one of federal law, not tribal law, a federal forum is appropriate.[18]

Iowa Mutual also suggests that the failure to defer to tribal courts would place federal courts "in direct competition with the tribal courts, thereby impairing the latter's authority over reservation affairs." 480 U.S. at 16.[19] This also sidesteps the essential inquiry. Whether the matter at issue is a "reservation affair" and one over which the tribe has "authority" is the very jurisdictional question that has yet to be answered. And, placing that federal question in federal court does not create competition – the federal court inquiry focuses on the jurisdictional question, and matters determined to be within tribal court jurisdiction would go forward in tribal court.[20]

[18] *Cf. Moses H. Cone*, 460 U.S. at 23 (the fact that federal law provides the rule of decision should be a factor in considering *Colorado River* abstention).

[19] *Iowa Mutual* relied in part on supposed protections accorded non-Indians under the Indian Civil Rights Act, 25 U.S.C. §§ 1301-03 (1994). 480 U.S. at 19. However, the Navajo Supreme Court has declined to apply the ICRA as being of suspect constitutionality. *See Rough Rock Community School (Rough Rock School Board, Inc.) v. Navajo Nation*, No. SC-CV-06-94; March 14, 1996) ("We reject the Petitioners' suggestion that we apply the [ICRA] to this issue. It is likely that the Act is unconstitutional under *United States v. Lopez*").

[20] The Ninth Circuit interprets *National Farmers Union* and *Iowa Mutual* as requiring dismissal or abstention even though there is no pending proceeding in tribal court. *See, e.g., Crawford v. Genuine Parts Co.*, 947 F.2d 1405, 1407 (9th Cir. 1991) ("Whether proceedings are actually pending in the appropriate tribal court is irrelevant."), *cert. denied*, 502 U.S. 1096 (1992).

The support of "tribal self-government and self determination" has been advanced as a rationale for the tribal exhaustion doctrine,[21] but determining the boundaries of tribal authority over non-Indians is a very different matter than – and appears to bear little relationship to – the exercise of tribal self-government and self-determination. *Strate* and *Montana* indicate that "a tribe's inherent power does not reach beyond what is necessary to protect tribal self-government or to control internal relations." *Strate*, 520 U.S. at 459; *Montana*, 450 U.S. at 564. The exhaustion doctrine does not appear necessary to meet those objectives.

In dealing with the exhaustion concept first articulated in 1986 in *National Farmers Union*, the Court is not faced with a long history of decisions as it was in *Kiowa Tribe*,[22] which addressed concepts of tribal immunity, nor is it dealing with an issue, the elimination of which would be disruptive of settled expectations. Permitting the federal courts to decide federal questions regarding the extent of tribal court jurisdiction would not impair any process. Rather, it would eliminate the expense and delay associated with what is essentially an advisory opinion. To the extent the tribal court or the tribe is an interested party in the judicial determination (as opposed to a litigant who, for whatever reason, prefers tribal court jurisdiction) either can be permitted as a matter of right to intervene or to appear as *amicus curiae* to inform the

---

[21] *Iowa Mutual*, 480 U.S. at 15-16; *National Farmers Union*, 471 U.S. at 856.

[22] *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 118 S. Ct. 1700, 1704-05 (1998).

federal court of the tribal interests, as distinguished from private interests, that are regarded as imperiled, as can the United States.[23]

It seems abundantly clear that the jurisdiction question should be decided initially and finally in federal court, which is the forum best-situated to resolve that issue. Accordingly, to the extent *National Farmers Union* and *Iowa Mutual* hold to the contrary, INGAA respectfully suggests that they be overruled.[24]

II. THE TRIBAL EXHAUSTION DOCTRINE DOES NOT APPLY TO FEDERAL PREEMPTION OR TO OTHER GATEKEEPING MATTERS NOT DEPENDENT ON TRIBAL LAW

Contrary to the approach taken below by the Ninth Circuit, the tribal exhaustion doctrine, as clarified by *Strate*, is not a rigid, unyielding doctrine. Rather, as indicated in *Strate*, in appropriate circumstances, federal courts should resolve the challenge to tribal jurisdiction in the first instance, without requiring exhaustion of tribal remedies. INGAA submits that this is such a case.

---

[23] *See, e.g., Tamiami Partners, Ltd. v. Miccosukee Tribe of Indians*, 999 F.2d 503 (11th Cir. 1993).

[24] Apart from the confusion in the courts, *National Farmers Union* and *Iowa Mutual* have spawned a multitude of articles and commentaries with varying conclusions and recommendations. *See, e.g.*, Laurie Reynolds: *Exhaustion of Tribal Remedies: Extolling Tribal Sovereignty While Expanding Federal Jurisdiction*, 73 N.C. L. Rev. 1089 (1995); Blake A. Watson, *The Curious Case of Disappearing Federal Jurisdiction over Federal Enforcement of Federal Law: A Vehicle for Reassessment of the Tribal Exhaustion/Abstention Doctrine*, 80 Marq. L. Rev. 531 (1997). It is better that this gordian knot be cut.

Strate decided two important questions – one dealing with the scope of tribal adjudicatory jurisdiction; the other dealing with the tribal exhaustion doctrine. Both are important in this case. With regard to the jurisdiction issue, *Strate* held that the adjudicatory jurisdiction of tribal courts is limited by the legislative/regulatory jurisdiction of the tribe; that is, if a tribe's legislative/regulatory power does not extend to a matter, the tribal courts cannot adjudicate with respect to that matter either. "As to nonmembers, we hold, a tribe's adjudicative jurisdiction does not exceed its legislative jurisdiction." *Id.* at 453.

> When, as in this case, it is plain that no federal grant provides for tribal governance of nonmembers' conduct on land covered by *Montana*'s main rule, it will be equally evident that tribal courts lack adjudicatory authority over disputes arising from such conduct. As in criminal proceedings, state or federal courts will be the only forums competent to adjudicate those disputes.

Id. at 459 n.14. The ruling that adjudicative jurisdiction cannot exceed regulatory jurisdiction is important here because of the preemption issue raised below. Preemption means that the tribes have no regulatory jurisdiction, and the absence of regulatory jurisdiction with respect to the issue means that tribal courts have no adjudicative jurisdiction on that issue.

Strate adopted a pragmatic approach to the tribal exhaustion doctrine and its exceptions. *Strate* teaches that, in some circumstances, the challenge to tribal court jurisdiction should be decided in the first instance in federal court without first taking up the jurisdictional challenge in tribal court. Specifically, the Court held that, when it is "plain" that the tribe lacks regulatory (and thus

adjudicative authority) over the dispute, the tribal exhaustion doctrine is not applicable.

> [W]hen tribal-court jurisdiction over an action such as this one is challenged in federal court, the otherwise applicable exhaustion requirement must give way, for it would serve no purpose other than delay.

Id. at 459-60 n.14.

INGAA submits that the federal preemption question raised by Petitioners below is precisely the type of issue that, under *Strate*, must be decided in federal court and may not be sent to tribal court.[25] Because adjudicatory jurisdiction cannot exceed regulatory jurisdiction, Petitioners' argument that tribal regulation was preempted by federal law is a jurisdictional challenge that *Strate* held should be decided in federal court. It was thus contrary to *Strate* and error for the Ninth Circuit to conclude that the tribal exhaustion doctrine prevented it from taking up the preemption question.[26]

---

[25] Preemption has been extensively litigated in federal court, and the case law and controlling principles are well-developed. *See Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 299-300 (1988); *Fidelity Fed. Sav. & Loan Ass'n v. De La Cuesta*, 458 U.S. 141, 152-54 (1982).

[26] Considerations of judicial economy counsel that preemption be decided at the outset and not postponed until after the challenge to tribal jurisdiction is concluded. Addressing the preemption issue first may resolve the jurisdictional challenge, thus eliminating the need for a searching review of the various matters that comprise the inquiry into tribal jurisdiction. *See National Farmers Union*, 471 U.S. at 855-56.

Under *Strate*, jurisdiction and other key "gatekeeping" questions such as preemption may properly be addressed in federal court at the outset and need not be remitted to tribal court or postponed until after the tribal court has ruled on the challenges to its jurisdiction. When such issues are raised "the otherwise applicable exhaustion requirement must give way, for it would serve no purpose other than delay."

III. INDIAN TRIBES ARE NOT EXEMPT FROM IMPLICIT PREEMPTION BY COMPREHENSIVE FEDERAL REGULATORY ACTION

Respondents appear to suggest that tribal regulatory authority cannot be preempted by comprehensive federal regulatory action unless Congress explicitly so states.[27] The enormous mischief of such an argument is readily apparent. There are numerous substantive areas that are comprehensively preempted by federal regulation where the statutory language makes no express reference to Indian tribes.[28] One can envision the problems if Indian tribes were free to impose different rates, different conditions of service, or different safety standards, for example. It is inconceivable that Congress intended to permit the various tribes to intrude into areas where federal regulation prevents state intrusion.

---

[27] *See* Respondents' Brief in Opposition to the Petition for Writ of Certiorari at 10-11.

[28] *See, e.g.*, the NGA; the Natural Gas Pipe Line Safety Act, 49 U.S.C. §§ 1671, 1672(a) (1994) (express preemption); the Food, Drug and Cosmetics Act (Medical Device Amendments), 21 U.S.C. § 360k(a) (1994) (express preemption).

The same considerations that give rise to preemption of state regulatory authority require preemption of tribal regulation as well. In *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293 (1988), speaking with respect to preemption under the NGA, the Court described those considerations as follows:

> The circumstances in which federal law pre-empts state regulation are familiar. A pre-emption question requires an examination of congressional intent. Of course, Congress explicitly may define the extent to which its enactments pre-empt state law. In the absence of explicit statutory language, however, Congress implicitly may indicate an intent to occupy a given field to the exclusion of state law. Such a purpose properly may be inferred where the pervasiveness of the federal interest in the field precludes supplementation by the States, where the federal interest in the field is sufficiently dominant, or "where the object sought to be obtained by federal law and the character of the obligations imposed by it reveal the same purpose." Finally, even where Congress has ~~not entirely~~ displaced state regulation in a particular field, state law is pre-empted when it actually conflicts with federal law. Such a conflict will be found "when it is impossible to comply with both state and federal law, or where the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress."

Id. at 299-300 (citations omitted). Nothing suggests that the preemptive force of these factors is any less potent in the context of regulation by Indian tribes, and, in fact, the contrary is the case. To hold otherwise would impair the

federal regulatory scheme and foster inconsistent regulatory requirements.

CONCLUSION

The decision of the Ninth Circuit should be reversed.

Respectfully submitted,

JOAN DRESKIN
General Counsel
Interstate Natural Gas Association
of America
10 G Street, N.E., Suite 700
Washington, D.C. 20002
(202) 216-5928 (telephone)
(202) 216-0876 (fax)

JAMES W. MCCARTNEY
Counsel of Record
3007 First City Tower
1001 Fannin Street
Houston, Texas 77002-6760
(713) 758-2324 (telephone)
(713) 615-5113 (fax)

RICHARD H. PAGE
VINSON & ELKINS L.L.P.
2300 First City Tower
1001 Fannin Street
Houston, Texas 77002-6760
(713) 758-2602 (telephone)
(713) 615-5625 (fax)

Attorneys for Amicus Curiae
Interstate Natural Gas Association
of America

Supreme Court, U.S.
FILED
DEC 8 1998
CLERK

No. 98-6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

EL PASO NATURAL GAS COMPANY, CYPRUS FOOTE MINERAL COMPANY, AND CYPRUS AMAX MINERALS COMPANY,
Petitioners,

v.

LAURA NEZTSOSIE; ARLINDA NEZTSOSIE; AND ZONNIE MARIE DANDY RICHARDS, INDIVIDUALLY AND AS REPRESENTATIVE OF THE ESTATE OF HAROLD J. RICHARDS, SR.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF FOR KERR-McGEE CORPORATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

MICHAEL R. COMEAU
JON J. INDALL
COMEAU, MALDEGEN, TEMPLEMAN & INDALL
141 East Palace Avenue
Santa Fe, N.M. 87504-0699
(505) 982-4611

JOHN TOWNSEND RICH
Counsel of Record
RICHARD T. CONWAY
SHEA & GARDNER
1800 Massachusetts Ave., N.W.
Washington, D.C. 20036
(202) 828-2000

Attorneys for Kerr-McGee Corporation

December 8, 1998

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTEREST OF THE *AMICUS* 1

THE SHIPROCK, NEW MEXICO, URANIUM LITIGATION 2

SUMMARY OF ARGUMENT 8

ARGUMENT 9

I. The Price-Anderson Amendments to the Atomic Energy Act Preclude Tribal Court Jurisdiction Over Nuclear Incident Litigation 9

II. Exhaustion of Tribal Court Remedies Should Not Be Required When a Federal Statute Precludes Tribal Court Jurisdiction 14

III. Exhaustion of Tribal Court Remedies Is Exceedingly Burdensome in Nuclear Tort Cases 20

CONCLUSION 23

APPENDIX A:

Order denying motion to dismiss, *Farley v. Kerr McGee*, No. SR-CV-103-95 (Navajo D. Ct., Shiprock, N.M., June 7, 1996)

TABLE OF AUTHORITIES

CASES: Page

Allen v. United States, 588 F. Supp. 247 (D. Utah 1984), *rev'd*, 816 F.2d 1417 (10th Cir. 1987) 21
Becenti v. Vigil, 902 F.2d 777 (10th Cir. 1990) 11
Benalli v. First National Insurance Co., No. SC-CV-45-96 (Navajo Oct. 26, 1998) 13
Chuska Energy Co. v. Navajo Tax Comm'n, 5 Navajo Rptr. 98 (1986) 6, 20
Colorado River Water Conservation District v. United States, 424 U.S. 800 (1976) 8, 17-19
Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993) 7, 21
Duke Power Co. v. Carolina Environmental Study Group, Inc., 438 U.S. 59 (1978) 3
Farley v. Kerr McGee, No. SR-CV-103-95 (Navajo D. Ct., Shiprock, N.M., June 7, 1996) (order denying motion to dismiss) 4-5
Guam v. Landgraf, 594 F.2d 201 (9th Cir. 1979) 11
In re Hanford Nuclear Reservation Litigation, No. CY-91-3015-AAM, 1998 U.S. Dist. LEXIS 15028 (E.D. Wash. Aug. 21, 1998) 21
Huffman v. Pursue, Ltd., 420 U.S. 592 (1975) 16
In re Estate of Belone, 5 Navajo Rptr. 161 (1987) 8, 14
In re TMI Litig. Cases Consol. II, 940 F.2d 832 (3d Cir. 1991) 7, 9
Iowa Mutual Insurance Co. v. LaPlante, 480 U.S. 9 (1987) ..... *passim*
Juidice v. Vail, 430 U.S. 327 (1977) 16
Kerr-McGee Corp. v. Farley, 915 F. Supp. 273 (D.N.M. 1995) 4
Kerr-McGee Corp. v. Farley, 115 F.3d 1498 (10th Cir. 1997), *cert. denied*, 118 S. Ct. 880 (1998) ..... *passim*
Montana v. United States, 450 U.S. 544 (1981) 6
Moses H. Cone Memorial Hospital v. Mercury Construction Corp., 460 U.S. 1 (1983) 9, 18-19

National Farmers Union Insurance Cos. v. Crow Tribe of Indians, 471 U.S. 845 (1985) ..... *passim*
Nieman v. NLO, Inc., 108 F.3d 1546 (6th Cir. 1997) 9
O'Conner v. Commonwealth Edison Co., 13 F.3d 1090 (7th Cir. 1994) 7, 9
Roberts v. Florida Power & Light Co., 146 F.3d 1305 (11th Cir.), *petition for cert. filed*, 67 U.S.L.W. 3285 (U.S. Oct. 16, 1998) (No. 98-640) 9
Strate v. A-1 Contractors, 520 U.S. 438 (1997) 6, 8, 10, 14, 19
Younger v. Harris, 401 U.S. 37 (1971) 16

STATUTES:

Atomic Energy Act of 1954, as amended, 42 U.S.C. § 2011 *et seq.* 3, 9
42 U.S.C. § 2014(hh) 10
42 U.S.C. § 2210(n)(2) 10, 11
42 U.S.C. § 2210(n)(3) 10
Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA") 42 U.S.C. §§ 9601 *et seq.* 21
Federal Arbitration Act, 9 U.S.C. § 1 *et seq.* 18
Navajo Nation Code tit. 7, § 253(B) 3
Navajo Tribal Council Resolution CF-19-80 (1980) 3
Price-Anderson Act of 1957 3
Price-Anderson Amendments Act of 1988 ..... *passim*
28 U.S.C. § 1257 11
28 U.S.C. § 1258 11
28 U.S.C. § 1331 15
28 U.S.C. § 1441 11
28 U.S.C. § 1442 11
28 U.S.C. § 1443 11
28 U.S.C. § 1444 11
28 U.S.C. § 2283 17

OTHER AUTHORITIES:

Raymond D. Austin, *Incorporating Tribal Customs and Traditions into Tribal Court Decisions*, in

Federal Bar Association, 1992 Indian Law Conference 71 12
Robert D. Cooter & Wolfgang Fikentscher, *Indian Common Law: The Role of Custom in American Indian Tribal Courts* (pt. I), 46 Am. J. Comp. L. 287 (1998) 14
Judith Resnik, *Dependent Sovereigns: Indian Tribes, States, and the Federal Courts*, 56 U. Chi. L. Rev. 671 (1989) 17
Judith V. Royster, *Stature and Scrutiny: Post-Exhaustion Review of Tribal Court Decisions*, 46 Kan. L. Rev. 241 (1998) 11, 13
S. Rep. No. 100-218 (1987) 10
Gloria Valencia-Weber, *Tribal Courts: Custom and Innovative Law*, 24 N.M. L. Rev. 225 (1994) 13, 14
Robert Yazzie, *"Life Comes From It": Navajo Justice Concepts*, 24 N.M. L. Rev. 175 (1994) 12-13
James W. Zion, *Searching for Indian Common Law*, in Indigenous Law and the State 121 (Bradford W. Morse & Gordon R. Woodmon eds. 1988) 13

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

No. 98-6

EL PASO NATURAL GAS COMPANY, CYPRUS FOOTE MINERAL COMPANY, AND CYPRUS AMAX MINERALS COMPANY,
Petitioners,

v.

LAURA NEZTSOSIE; ARLINDA NEZTSOSIE; AND ZONNIE MARIE DANDY RICHARDS, INDIVIDUALLY AND AS REPRESENTATIVE OF THE ESTATE OF HAROLD J. RICHARDS, SR.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF FOR KERR-McGEE CORPORATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF THE *AMICUS*[1]

The Kerr-McGee Corporation ("Kerr-McGee") is in a position almost identical to the position of petitioners in this case. It is a defendant in Navajo tribal court litigation in which tribe-member

---

[1] The parties have consented to the filing of this brief, and their written consents have been filed with the Clerk. No counsel for a party in this case authored this brief in whole or in part. No person or entity other than the *amicus curiae* made a monetary contribution to the preparation or submission of this brief.

plaintiffs are seeking damages for alleged release of radioactive and toxic materials from a uranium mill that operated more than thirty years ago on land leased from the Navajo Tribe. As did the petitioners, Kerr-McGee sought and failed to win injunctive relief against the tribal court action on the ground that the Price-Anderson amendments to the Atomic Energy Act precluded the tribal court litigation. And like petitioners again, Kerr-McGee may face other tribal court actions arising from its long abandoned uranium milling operations on Navajo land.

Because this case may determine the extent to which the Price-Anderson amendments preclude tribal court jurisdiction over such actions and the extent to which *National Farmers Union Insurance Cos. v. Crow Tribe of Indians*, 471 U.S. 845 (1985), and *Iowa Mutual Insurance Co. v. LaPlante*, 480 U.S. 9 (1987), require that such jurisdictional issues be heard first in tribal court, Kerr-McGee files this *amicus* brief to support petitioners on the merits and to ensure that this Court is fully informed about the practical impact of decisions that require actions such as this one to be heard first in tribal courts.

THE SHIPROCK, NEW MEXICO, URANIUM LITIGATION

Amicus believes that an understanding of Kerr-McGee's experience in facing nuclear incident litigation in tribal court will be instructive to this Court in considering the legal arguments presented by this case. Accordingly, we include below a description of the relevant facts concerning the related tribal court action against Kerr-McGee and others.

Background. In 1953, as part of a program to encourage private companies to develop domestic supplies of uranium concentrate to fulfill urgent military requirements, the Atomic Energy Commission ("AEC") entered into an agreement with Kerr-McGee, pursuant to which Kerr-McGee built and operated a uranium mill near Shiprock, New Mexico, on reservation lands that Kerr-McGee leased from the Navajo Tribe. Under the terms of the lease, the Navajo Nation could not terminate the lease, except with the permission of the AEC. The AEC contract contained terms specifying when and how the mill would be built, the process

through which uranium concentrate would be produced from uranium-bearing ores, and permissible sources of ore. Kerr-McGee operated the Shiprock mill until 1962, followed by a company later acquired by Cyprus Foote Mineral Corp. ("Cyprus Foote"), which continued operations until 1968, when the mill was closed. In 1973 the lease for the mill site expired, and control of the site reverted to the Tribe.

The operation of the Shiprock mill was subject to pervasive regulation by the AEC under the Atomic Energy Act of 1954, as amended, 42 U.S.C. §§ 2011 *et seq.* In 1957, as explained more fully in the Brief for Petitioners, Congress enacted the Price-Anderson Act as an amendment to the Atomic Energy Act, in response to concerns expressed by "spokesmen for the private sector * * * that they would be forced to withdraw from the field if their liability were not limited by appropriate legislation." *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 64 (1978). And in 1988, again as more fully explained in the Brief for Petitioners, Congress enacted the Price-Anderson Amendments Act of 1988 to establish an exclusive adjudicatory framework covering *any* claim of alleged injury from nuclear materials.

At the time that Kerr-McGee entered into the lease and the AEC contract, the Navajo courts asserted civil jurisdiction over Indian defendants, but not over non-Indian defendants. Accordingly, at that time, Kerr-McGee had no reasonable expectation of being sued in tribal court for actions relating to operation of the Shiprock mill. It was not until 1980, long after the mill had closed, that the Navajo courts asserted civil jurisdiction over actions in which the defendant "is a resident of Navajo Indian country, or has caused an action to occur in Navajo Indian country." Navajo Tribal Council Resolution CF-19-80, ¶ 1 (1980).[2]

The Tribal Court Action. In January 1995, the estates and certain relatives of two deceased members of the Navajo Nation,

[2] In its current form, the Navajo civil jurisdictional statute states that the District Courts of the Navajo Nation shall have jurisdiction over all civil actions "in which the defendant is a resident of Navajo Indian Country, or has caused an action to occur within the territorial jurisdiction of the Navajo Nation." Navajo Nation Code tit. 7, § 253(B).

Lucy K. Farley and Julia Mae Kady, filed suit in Navajo tribal court against the former operators of the Shiprock mill, seeking damages under Navajo law and alleging that the mill had released "vast quantities" of radioactive and toxic materials from the mill causing them various injuries, including wrongful death. Complaint, *Kee Tom Farley, on behalf of the estate of Lucy K. Farley, et al. v. Kerr McGee et al.*, No. SR-CV-04-95 (Navajo D. Ct., Shiprock, N.M., Jan. 12, 1995). The suit was also filed on behalf of 1,000 John Does. Plaintiffs seek compensatory and punitive damages.

The U.S. District Court's Denial of Injunctive Relief. Kerr-McGee and Cyprus Foote promptly filed suit in federal district court seeking an injunction against the tribal court proceedings, on the grounds that the tribal court had no jurisdiction to consider nuclear tort claims in light of the Atomic Energy Act and its Price-Anderson amendments. Relying upon its understanding of the tribal court exhaustion rule of *National Farmers Union Insurance Cos. v. Crow Tribe of Indians*, 471 U.S. 845 (1985), and *Iowa Mutual Insurance Co. v. LaPlante*, 480 U.S. 9 (1987), the district court denied the requested injunction and stayed federal court proceedings. It ruled that (1) the tribal courts presumptively had jurisdiction; (2) the Price-Anderson amendments did not constitute an "express jurisdictional prohibition" of tribal court jurisdiction, within the meaning of the second *National Farmers* exception to the tribal court exhaustion rule, and (3) no extended comity analysis was necessary because the action was based on activities that took place on the reservation. *Kerr-McGee Corp. v. Farley*, 915 F. Supp. 273 (D.N.M. June 8, 1995).

The Tribal Court's Denial of Dismissal. Kerr-McGee and Cyprus Foote had also moved in Navajo tribal court to dismiss the complaint on jurisdictional grounds.[3] The tribal district court denied the motion in June 1996. (A copy of the tribal court order is attached as Appendix A.) With respect to the Price-Anderson amendments, the tribal court found that, because the amendments did not provide for exclusive federal court jurisdiction, the tribal

[3] This motion was filed in tribal court on June 5, 1995, after the federal district court had orally denied injunctive relief, but shortly before it issued its written opinion.

courts were permitted to exercise concurrent jurisdiction over nuclear incident litigation. Order at 14-16, App. A at 12a-13a. It also found that tribal court adjudication of a "common law tort" under tribal law does not conflict with the federal government's "complete control of the safety and 'nuclear' aspects of energy generation." Order at 16-17, App. A at 14a. Finally, the tribal court ruled that the action had not been shown to be a "public liability" action covered by the Price-Anderson Act because defendants had not shown that they were "licensed with the federal government" or "covered by federal indemnity insurance" and because plaintiffs had not named government agencies or officials as defendants. Order at 19-20, App. A at 16a-17a.[4] Accordingly, the tribal court permitted the plaintiffs' "common law tort" action under tribal law to proceed.

The Tenth Circuit Decision. One year later, the U.S. Court of Appeals for the Tenth Circuit affirmed the U.S. district court's denial of injunctive relief against the tribal court action. *Kerr-McGee Corp. v. Farley*, 115 F.3d 1498 (10th Cir. June 25, 1997). The court of appeals observed, as an initial matter, that the tribal court claimants (and thus, by extension, the tribal court itself) erred in claiming that Price-Anderson did not apply to this case because Kerr-McGee lacked an indemnity agreement with the federal government (*id.* at 1504). It also agreed with Kerr-McGee and Cyprus Foote that Price-Anderson "on its face provides the sole remedy for the torts alleged in this case" (*id.*). It further agreed that Price-Anderson "does not include removal from tribal courts in its jurisdictional grant" but nevertheless declined to find at this time that Price-Anderson "created an exclusive enclave of federal adjudicatory control such that tribal courts lack jurisdiction to decide [Price-Anderson] claims, even those arising out of torts

[4] In fact, it was undisputed that Kerr-McGee and the Cyprus Foote predecessor company were licensed by the AEC and also clear that Price-Anderson does not require that plaintiffs name the government as a defendant. As a result, the tribal court claimants did not make either of these two arguments in the Tenth Circuit, where they contended that Price-Anderson was inapplicable only because of the absence of an indemnity agreement with the Government. As we explain below, the Tenth Circuit specifically rejected that argument.

against tribal members on the reservation" (*id.* at 1505). In addition, it found that *National Farmers* and *Iowa Mutual* on the one hand and *Montana v. United States,* 450 U.S. 544 (1981), and its successor decisions on the other hand continue to present "two arguably divergent strands of caselaw" that might need to be "reconcil[ed]" in cases of congressional silence (*id.* at 1506), rejecting the contention of Kerr-McGee and Cyprus Foote that this Court's then-recent decision in *Strate v. A-1 Contractors*, 520 U.S. 438 (1997), had itself reconciled those "divergent" strands. It also ruled that the holding in *Strate* that "[a]s to nonmembers * * * a tribe's adjudicative jurisdiction does not exceed its legislative jurisdiction" is inapplicable to the case, because it read *Strate* as limiting that holding to "lands over which the tribe has ceded authority and control to another sovereign for an indefinite period," (115 F.3d at 1506 n.4) and because the Price-Anderson amendments were "unclear on the extent to which state (or tribal) law may inform the issue of a nuclear tortfeasor's liability" (*id.* at 1507 n.6). Finally, it ruled that comity factors supported abstention (*id.* at 1507-09), in part because there appeared to be an open issue whether the substantive rule of decision "should be derived from Navajo tribal law," even though Price-Anderson expressly requires the application of federal law and, in some circumstances, "state" law, with no mention of "tribal" law (*id.* at 1507 n.6 & 1508).

This Court denied the petition of Kerr-McGee and Cyprus Foote for a writ of certiorari. 118 S. Ct. 880 (Jan. 26, 1998).

Subsequent Proceedings in Tribal Court. Following failure to obtain injunctive relief from the federal courts, the case has continued in tribal court. In November 1997, Kerr-McGee moved for reconsideration of the June 6, 1996 order declining to dismiss the complaint, relying on the intervening decisions of this Court in *Strate* and of the Tenth Circuit in *Kerr-McGee v. Farley*. In addition, in March 1998, Kerr-McGee asked the tribal court to certify the issue of subject matter jurisdiction to the Navajo Supreme Court for review. On April 28, 1998, the tribal court orally denied both motions. Without the requested certification, the tribal court's denial of the motion to dismiss the complaint is not an appealable order in the Navajo courts. *Chuska Energy Co. v. Navajo Tax Comm'n*, 5 Navajo Rptr. 98, 102 (1986). As matters

stand, accordingly, the case will proceed to trial on plaintiffs' tribal law theories.[5]

In an effort to narrow discovery, Kerr-McGee had filed a motion asking the tribal court to rule that the case would be governed by a federal standard of care, arguing that, under prevailing case law, compliance with contemporaneous government regulatory standards constitutes a complete defense in a nuclear tort case.[6] In a separate motion, Kerr-McGee also asked the tribal court to rule that it would adhere to the rule of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), to assure that expert opinions in the case are scientifically reliable and relevant. In April 1998, the court denied both motions orally without prejudice, indicating that an opinion would follow, but leaving undecided what standard of care will govern the case and what gatekeeping function, if any, the tribal court will apply to expert opinions on the medical and scientific issues in the case. No written opinion has been issued as of this date.

Extensive discovery requests have been filed, and discovery remains ongoing. Numerous discovery issues remain unresolved at this time, including the extent of discovery relating to expert witnesses.[7] The tribal court has ordered that discovery shall be

---

[5] When they answered the complaint, Kerr-McGee and Cyprus Foote had included a third-party complaint for indemnification against the United States and the Nuclear Regulatory Commission, in part because the AEC had for a time owned the mill tailings that were a subject of the lawsuit. On September 5, 1997, the tribal court denied a Kerr-McGee and Cyprus Foote motion for default judgment against the federal defendants, ruling that the court lacked jurisdiction over the federal defendants because Congress had not waived sovereign immunity as to actions against the United States in tribal courts.

[6] The motion pointed out that courts addressing the applicable standard of care have invariably held that federal regulations governing radiation exposure, not state law, dictate the standard of care for all claims under the Price-Anderson Act, regardless of the underlying tort theory. See, *e.g.*, *In re TMI Litig. Cases Consol. II*, 940 F.2d 832, 859-60 (3d Cir. 1991); *O'Conner v. Commonwealth Edison Co.*, 13 F.3d 1090, 1105 (7th Cir. 1994).

[7] Because the plaintiffs claimed substantial amounts as compensation for sums paid to Navajo medicine men for healing ceremonies, Kerr-McGee had sought to verify these expenditures by seeking the names of the medicine men

completed by August 31, 1999, and has set a trial date of April 1, 2000.

SUMMARY OF ARGUMENT

In Part I of this brief, Kerr-McGee supports petitioners' argument that the Price-Anderson amendments to the Atomic Energy Act preclude tribal court jurisdiction over nuclear incident litigation—so that abstention in favor of tribal court proceedings "would serve no purpose other than delay." *Strate v. A-1 Contractors*, 520 U.S. 438, 459 n.14 (1997). This conclusion follows not only from the language, structure, and history of the Price-Anderson amendments, but also from the unlikelihood that Congress intended tribal law—based as it is on tribal custom, tradition, and religious belief, as well as statute and judicial decision —to govern nuclear incident litigation.

While Kerr-McGee strongly supports petitioners' demonstration that this Court's existing tribal exhaustion doctrine, as clarified by *Strate*, requires reversal of the decision below, in Part II we urge this Court to make a general clarification of the tribal exhaustion doctrine and to rule that federal courts should normally decide contentions that a federal statutory scheme precludes tribal court jurisdiction over a particular class of claim, without abstention in favor of tribal courts. This clarification is supported by the abstention doctrine of *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976), which this Court described

---

and identification of the ceremonies performed. Plaintiffs declined to answer, claiming that this information is privileged under Navajo tradition. In July 1997, Kerr-McGee moved to compel answers to the questions, arguing that Navajo tradition does not recognize such a privilege. Having before it contradictory affidavits from Navajo medicine men on the issue, the court denied the motion and, following the procedure set forth in *In re Estate of Belone*, 5 Navajo Rptr. 161 (1987), ordered an informal pre-trial conference with two or three expert witnesses on Navajo tradition and custom to be appointed by the court. Order of Nov. 7, 1997. The tribal court later invited the parties to agree on one such expert, with the opportunity to offer rebuttal experts. Status Conf. of July 17, 1998, Tr. at 31. The parties have failed to agree and have referred the matter again to the tribal court, where it remains pending.

in *Iowa Mutual* as analogous to tribal exhaustion, and by the clarification of *Colorado River* abstention in *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1 (1983).

Finally, in Part III, we describe the substantial burdens that a tribal exhaustion requirement imposes on defendants in nuclear incident litigation, with special reference to Kerr-McGee's experience in the Shiprock, New Mexico, uranium litigation. These burdens could be avoided by allowing federal courts to determine in the first instance whether a federal statute precludes tribal court jurisdiction, without requiring exhaustion of tribal court remedies.

ARGUMENT

I. The Price-Anderson Amendments to the Atomic Energy Act Preclude Tribal Court Jurisdiction Over Nuclear Incident Litigation.

Petitioners' brief has set forth in detail the comprehensive nature of federal regulation of the nuclear industry under the Atomic Energy Act of 1954, and the congressional decision in the Price-Anderson Amendments Act of 1988 to "create[ ] a federal cause of action which did not exist prior to the Act," *In re TMI Litig. Cases Consol. II*, 940 F.2d 832, 856 (3d Cir. 1991), and to assure federal court jurisdiction over all "public liability actions" as defined in the Act. As petitioners further explain, every other court of appeals that has addressed the issue has held that Price-Anderson establishes an exclusive federal remedy for nuclear-related torts, preempting any other theories of liability.[8] Under the circumstances it would be

---

[8] *In re TMI Litig. Cases Consol. II*, 940 F.2d at 854 ("A claim growing out of any nuclear incident is compensable under the terms of the Amendments Act or *it is not compensable at all*"; state-law claims preempted); *Nieman v. NLO, Inc.*, 108 F.3d 1546, 1553 (6th Cir. 1997) ("Nieman can sue under the Price-Anderson Act, as amended, or not at all"; state-law claims preempted); *O'Conner v. Commonwealth Edison Co.*, 13 F.3d 1090, 1105 (7th Cir. 1994) ("state regulation of nuclear safety, through either legislation or negligence actions, is preempted by federal law"); *Roberts v. Florida Power & Light Co.*, 146 F.3d 1305 (11th Cir.) (endorsing *TMI*, *Nieman*, and *O'Conner*; state-law claims preempted), *petition for cert. filed*, 67 U.S.L.W. 3285 (U.S. Oct. 16, 1998) (No. 98-640). As explained above, the Tenth Circuit agreed with these

contrary to the statutory scheme itself and to all evidence of congressional intent to imply an unwritten exception that would permit either claims based on tribal law or federally-based Price-Anderson claims to be adjudicated in tribal court. Such adjudication, as petitioners state, is wholly at odds with both the language and objectives of Price-Anderson.

In light of this demonstration, it is also clear that precluding tribal court jurisdiction in these cases is a simple application of the ruling of this Court in *Strate v. A-1 Contractors*, 520 U.S. 438, 453 (1997), that, "[a]s to nonmembers, * * * a tribe's adjudicative jurisdiction does not exceed its legislative jurisdiction." As petitioners have demonstrated, Indian tribes have no legislative jurisdiction to regulate the nuclear activities of corporations engaged in the nuclear industry in any manner that would relate to these lawsuits. Accordingly, under *Strate*, they have no jurisdiction to adjudicate claims arising from such activities.

Moreover, Price-Anderson expressly provides for federal court jurisdiction and makes suits filed in State courts removable as a matter of right without providing for either tribal court jurisdiction or for removal from tribal court. 42 U.S.C. § 2210(n)(2). The primary purpose of this jurisdictional scheme is to facilitate consolidation and handling of all cases arising out a nuclear incident in a single federal court, see, *e.g.*, S. Rep. No. 100-218, at 13 (1987), and § 2210(n)(3) contains specific procedures for such consolidation and special handling. That purpose and the availability of those specific procedural provisions would be undermined if tribal court jurisdiction is not precluded.

As petitioners explain, the plaintiffs in this case have never argued that the provision of Price-Anderson that borrows elements "from the law of the State in which the nuclear incident involved occurs," where that law is consistent with the Price-Anderson Act, 42 U.S.C. § 2014(hh), can be read to borrow *tribal* law when the occurrence is on an Indian reservation. While this position had some appeal to the Tenth Circuit in *Farley*, see 115 F.3d at 1507

---

statements. *Kerr-McGee Corp. v. Farley*, 115 F.3d 1498, 1504 (10th Cir. 1997) (Price-Anderson "on its face provides the sole remedy for the torts alleged in this case").

n.6 & 1508, it makes no sense to read "State" to mean "tribe" in the provision of the Act addressing borrowing of substantive law, while not reading it the same way in the closely-related provision that provides for removal of Price-Anderson cases from "State" court, 42 U.S.C. § 2210(n)(2).[9]

In this connection, there is another reason why it is unlikely that Congress would have intended to "borrow" from tribal law for Price-Anderson claims: the extent to which tribal law differs from the common law of torts that is virtually universal in the States. To take the example of the tribe on whose reservation both this case and the related Tenth Circuit decision in *Farley* arose, the Navajo Nation takes pride in having developed and applied a body of tribal law that is based on the customs of the Navajo people and their religious beliefs, and that is intended to be different from customary

---

[9] The Tenth Circuit's statement in *Kerr-McGee Corp. v. Farley*, 115 F.3d at 1505, that the Price-Anderson removal provision does not permit removal from tribal courts is consistent with its prior decision that the general removal statutes, 28 U.S.C. §§ 1441-44, permit removal from State courts only, and not from other courts (absent specific statutory provision). *Becenti v. Vigil*, 902 F.2d 777 (10th Cir. 1990) (no removal under § 1442 from tribal courts); see also *Guam v. Landgraf*, 594 F.2d 201 (9th Cir. 1979) (no removal under § 1443 from courts of the Territory of Guam). Federal court review of cases tried in tribal court is not available in this Court by way of writ of certiorari because 28 U.S.C. § 1257 authorizes such review only of final judgments from the highest court of "a State" and because other provisions relating to territories do not mention tribal courts. *E.g.*, 28 U.S.C. § 1258 (certiorari review of decisions of Supreme Court of Puerto Rico). This Court has not yet resolved the extent to which review of federal law issues on the merits, decided in tribal court litigation, may be obtained in federal district court. Compare *National Farmers*, 471 U.S. at 856 (stating that the exhaustion rule exists to allow tribal courts the chance to develop the record "before either the merits or any question concerning appropriate relief is addressed") with *Iowa Mutual*, 480 U.S. at 19 (stating that "proper deference to the tribal court system precludes relitigation of issues raised [by plaintiffs' bad faith claim] and resolved in the Tribal Courts"); see also Judith V. Royster, *Stature and Scrutiny: Post-Exhaustion Review of Tribal Court Decisions*, 46 Kan. L. Rev. 241, 271-81 (1998) (discussing lower court cases concerning post-exhaustion review). A ruling that nuclear incident litigation must be heard by state or federal courts in the first instance ensures federal court review of the federal law issues presented by Price-Anderson claims.

"Western" law. The following quotation from an article by an Associate Justice of the Navajo Supreme Court is illustrative:

> "The Navajo common law * * * is a corpus of law based upon the values and norms of the Navajo people, as expressed in their customs, traditions, usages and morals. * * * The Navajo common law is stated in creation beliefs, religious ceremonies, stories and practices which are centuries-old, and they help Navajos survive under changing circumstances." Raymond D. Austin, *Incorporating Tribal Customs and Traditions into Tribal Court Decisions*, in Federal Bar Association, 1992 Indian Law Conference 71, 71.

An article more specifically addressing tort law, by the Chief Justice of the Navajo Nation, is also illustrative:

> "[T]raditional Navajo tort law is based on *nalyeeh*, which is a demand by a victim to be made whole for any injury. In the law of *nalyeeh*, one who is hurt is not concerned with intent, causation, fault, or negligence. If I am hurt, all I know is that I hurt; that makes me feel bad and makes those around me feel bad too. I want the hurt to stop, and I want others to acknowledge that I am in pain. The maxim for *nalyeeh* is that there must be compensation so there will be no hard feelings. This is restorative justice. Returning people to good relations with each other in a community is an important focus. Before good relations can be restored, the community must arrive at a consensus about the problem." Robert Yazzie, *"Life Comes From It": Navajo Justice Concepts*, 24 N.M. L. Rev. 175, 184-85 (1994).

And later in the same article Chief Justice Yazzie states:

> "Navajo case outcomes are often a kind of absolute liability where helping a victim is more important than determining fault. Distributive justice is concerned with the well-being of everyone in a community. For instance, if I see a hungry person, it does not matter whether I am responsible for the hunger. If someone is injured, it is irrelevant that I did not hurt that person. I have a responsibility, as a Navajo, to treat everyone as if he or she were my relative and therefore to help that hungry person. I am responsible for all my relatives. This value which translates itself into law under the Navajo system of justice is that everyone is part of a community, and the resources of the community must be shared with all. Distributive justice abandons fault and adequate compensation (a fetish of personal injury lawyers) in favor of assuring well-being for everyone. This affects the legal norms surrounding wrongdoing and elevates restoration over punishment." *Id.* at 185 (footnotes omitted).

A recent opinion of the Navajo Supreme Court (by Chief Justice Yazzie) makes the same general point:

> "When there is an injury, Navajo common law requires the negotiation of the amount of *nalyeeh* [roughly, the amount of payment] based upon the effects of the injury and ability of the tortfeasor and his or her relatives to make things right. The Navajo maxim is that it should be enough 'so there will be no hard feelings.'" *Benalli v. First National Insurance Co.*, No. SC-CV-45-96, slip op. at 16 (Navajo Oct. 26, 1998).

The Navajo Nation has thus developed and is continuing to develop a body of tribal law suited to its people, their customs, traditions, and needs. Many other tribes are doing the same, with results that are very different from both Navajo law and the law of the States.[10] Under the circumstances, it is implausible that

---

[10] See, *e.g.*, Judith V. Royster, *supra* note 9, at 247-48, and articles cited therein, and Gloria Valencia-Weber, *Tribal Courts: Custom and Innovative Law*, 24 N.M. L. Rev. 225 (1994), and articles cited therein. See also James W. Zion, *Searching for Indian Common Law*, in Indigenous Law and the State 121, 129 (Bradford W. Morse & Gordon R. Woodman eds. 1988): "[Substantive Indian common law] exists in a form that is not always easily recognized, consisting of the sayings taught in childhood, the prayers of ceremonies, hero stories, animal stories, and humorous tales about members of the community. These form, in the mind of the adult Indian, a body of law which he or she may be hard-pressed to articulate in terms of actual rules, but which are there in the mind. This is why Indians, and only Indians, can truly have a comprehensive knowledge of their law." In Navajo tribal courts, tribal

Congress contemplated that toxic tort litigation against non-Indian corporations that had contracted with the Government to aid the development of nuclear power and nuclear weapons would be governed, even in part, by such a diverse set of legal principles, and that such principles would be developed on a case-by-case basis in tribal courts that have long been underfunded, before non-Article-III judges, before being relitigated in whole or in part in federal court.[11]

II. Exhaustion of Tribal Court Remedies Should Not Be Required When a Federal Statute Precludes Tribal Court Jurisdiction.

Petitioners argue that the Ninth Circuit's application of the tribal exhaustion requirement of *National Farmers* and *Iowa Mutual* was erroneous because it disregarded the important federal interests that caused Congress to adopt Price-Anderson and failed to follow this Court's most recent decision on that doctrine, *Strate v. A-1 Contractors*, 520 U.S. 438 (1997). In this part, we urge this Court to clarify the tribal exhaustion doctrine more generally by ruling that federal courts should normally decide, without abstention, contentions that a comprehensive federal statutory scheme precludes tribal court jurisdiction over a particular class of claim. Such a clarification would not overrule *National Farmers* or *Iowa Mutual*, but simply require attention to the circumstances under which those cases arose and the different considerations that arise when a federal statute precludes tribal court jurisdiction.

National Farmers and *Iowa Mutual* both arose from traffic accidents on land located on Indian reservations. Both involved the

---

customs may be proved by a variety of methods, including judicial notice and expert testimony. See, *e.g.*, *In re Estate of Belone*, 5 Navajo Rptr. 161, 165-66 (1987).

[11] For a recent anthropological survey of tribal courts, see Robert D. Cooter & Wolfgang Fikentscher, *Indian Common Law: The Role of Custom in American Indian Tribal Courts* (pt. I), 46 Am. J. Comp. L. 287 (1998) (noting at 322 that some reservations have no age, experience, or law background qualifications for their judges). See also Gloria Valencia-Weber, *Tribal Courts: Custom and Innovative Law*, 24 N.M. L. Rev. 225, 237-40 (1994) (discussing, among other things, underfunding of tribal courts).

adjudication of non-federal tort claims. Neither involved a specific federal regulatory regime that may have precluded tribal court jurisdiction. Indeed, the *National Farmers* decision specifically relied on the absence of controlling federal legislation:

> "[A]lthough Congress' decision to extend the criminal jurisdiction of the federal courts to offenses committed by non-Indians against Indians within Indian Country supported the holding in *Oliphant* [*v. Suquamish Indian Tribe*, 435 U.S. 191 (1978),] there is no comparable legislation granting the federal courts jurisdiction over civil disputes between Indians and non-Indians that arise on an Indian reservation." 471 U.S. at 854.

Accordingly, although the Court in *National Farmers* held that the question of tribal court jurisdiction in the case was a federal question under 28 U.S.C. § 1331, 471 U.S. at 852, that federal question was to be answered first by the tribal court.

National Farmers did not hold, however, that such abstention was required when it was claimed that a specific federal statute preempted tribal court jurisdiction over the type of dispute at issue. It is true that, in holding that the federal courts should have abstained from ruling on tribal court jurisdiction in *National Farmers*, the Court made a broad statement that can be read to require abstention even when a federal statute may provide the answer:

> "Rather, the existence and extent of a tribal court's jurisdiction will require a careful examination of tribal sovereignty, the extent to which that sovereignty has been altered, divested, or diminished, as well as a detailed study of relevant statutes, Executive Branch policy as embodied in treaties and elsewhere, and administrative or judicial decisions.
>
> "We believe that examination should be conducted in the first instance in the Tribal Court itself." 471 U.S. at 855-56 (footnote omitted).

In context, however, this statement should not be taken as deciding whether a federal court should abstain when a litigant claims that a

federal regulatory scheme specifically addressing the type of claim at issue precludes tribal court jurisdiction.

In addressing that question, the Court should look to principles developed in the abstention doctrines that govern federal court proceedings in the face of ongoing state court proceedings, because both *National Farmers* and *Iowa Mutual* relied on cases reflecting those doctrines as providing useful analogies. And those cases point toward the rule that we propose.

The *National Farmers* decision is sparse in explaining its relationship to older abstention doctrine. Nevertheless, in setting forth three exceptions to its tribal court abstention doctrine—(1) "where an assertion of tribal jurisdiction 'is motivated by a desire to harass or is conducted in bad faith,'" (2) where the action is patently violative of express jurisdictional prohibitions, or (3) where exhaustion would be futile because of the lack of an adequate opportunity to challenge the court's jurisdiction," 471 U.S. at 856 n.21—the Court cited *Juidice v. Vail*, 430 U.S. 327, 338 (1977). *Juidice* is an important case addressing the application of the abstention doctrines of *Younger v. Harris*, 401 U.S. 37 (1971), in the context of a pending state civil proceeding.[12] Thus, the Court in *National Farmers* was drawing on the older doctrine governing the circumstances in which it is appropriate for a federal court to abstain in favor of ongoing state proceedings, while taking account of appropriate differences in light of long-standing respect for tribal sovereignty.

Iowa Mutual set forth a further doctrinal analogy, drawing again on precedent from abstention doctrine in the federal-state context:

> "Exhaustion is required as a matter of comity, not as a jurisdictional prerequisite. In this respect, the rule is

[12] In *Juidice*, the Court pointed out that it had noted in *Huffman v. Pursue, Ltd.*, 420 U.S. 592 (1975), that *Younger* principles do not apply "'where the District Court properly finds that the state proceeding is motivated by a desire to harass or is conducted in bad faith, or where the challenged statue is flagrantly and patently violative of express constitutional prohibitions in every clause, sentence and paragraph, and in whatever manner and against whomever an effort might be made to apply it.'" 430 U.S. at 338, quoting *Huffman*, 420 U.S. at 611 (other internal quotation marks omitted). The *National Farmer* exceptions were obviously drawn, in substantial part, from this precedent.

> analogous to principles of abstention articulated in *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976): even where there is concurrent jurisdiction in both the state and federal courts, deference to state proceedings renders it appropriate for the federal courts to decline jurisdiction in certain circumstances. In *Colorado River*, as here, strong federal policy concerns favored resolution in the nonfederal forum." 480 U.S. at 16 n.8.

This footnote confirms that the tribal exhaustion doctrine is a particular application of more general abstention notions that arose to address the common occurrence of concurrent proceedings in state and federal courts.[13]

The citation to *Colorado River* is particularly striking because the general rule of that case is that only "exceptional circumstances" justify a federal court in declining to decide a case properly within its jurisdiction. And, in fact, the *Colorado River* analogy provides no support for federal court abstention when a specific federal statutory scheme precludes tribal court jurisdiction. In *Colorado River*, the jurisdiction of the state courts to adjudicate the water rights at issue was never in dispute. After finding that *federal* court jurisdiction had not been divested by the federal statute at issue, the Court proceeded to rule that the merits of the dispute, not any jurisdictional issue, were better adjudicated in state court proceedings, under the "exceptional circumstances" test for federal court abstention. 424 U.S. at 813. One reason for the Court's ruling was the "clear federal policy" evinced by applicable federal legislation—"the avoidance of piecemeal adjudication of water rights in a river system," *id.* at 819—combined with the fact of ongoing state proceedings in which all claims could be

[13] While the tribal exhaustion requirement is thus linked to the abstention doctrines governing state and federal courts, there are, of course, differences. 28 U.S.C. § 2283 specifically limits federal court power to enjoin proceedings in state court. There is no similar Congressional limitation on federal court power to enjoin proceedings in tribal courts. Interconnections between the law governing state-federal relations and that governing tribal-federal relations are discussed in Judith Resnik, *Dependent Sovereigns: Indian Tribes, States, and the Federal Courts*, 56 U. Chi. L. Rev. 671 (1989).

adjudicated.[14] Other reasons were the extent to which state proceedings had gone forward, the extensive involvement of state water rights issues, the comparative convenience of the forums, and the Government's existing participation in related state proceedings. This case thus counsels close attention to the kind of practical concerns that petitioners argued in this case and that Kerr-McGee argued in the *Farley* litigation. This kind of attention might well point to abstention in routine traffic cases such as *National Farmers* and *Iowa Mutual*, and cases of a similar nature. But it points to a prompt federal court decision on the jurisdictional question whether a specific federal statutory scheme precludes tribal court jurisdiction.

Indeed, this Court later clarified *Colorado River* abstention to emphasize the importance of whether federal law provides the rule of decision in the federal case. In *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1 (1983), this Court reaffirmed what it termed "*Colorado River*'s exceptional circumstances test," 460 U.S. at 16, and clarified that another important factor in *Colorado River* abstention is whether "federal law provides the rule of decision on the merits." *Id.* at 23. Indeed, the Court specifically concluded: "Although in some rare circumstances the presence of state-law issues may weigh in favor of [surrender of federal court jurisdiction], * * * the presence of federal-law issues must always be a major consideration weighing against surrender." *Id.*

This passage from *Moses H. Cone Memorial Hospital* does not concern the law governing the underlying dispute between the parties. It concerns the issue of arbitrability of the underlying dispute under the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.*—an issue that was pending in state court—and the entitlement of the party seeking federal court relief to an order under the Federal Arbitration Act compelling arbitration. The district court had stayed the federal court action out of deference to the state court proceeding, which included the arbitrability issue. The court of

[14] Similarly, here the federal policy is to permit all tort claims arising from a nuclear incident to be decided in a single federal court proceeding.

appeals and the Supreme Court agreed that the district court stay was improper under *Colorado River*, as clarified.

Colorado River as clarified by *Moses H. Cone Memorial Hospital* thus counsels in favor of federal courts ruling on claims that a federal statutory scheme precludes tribal court jurisdiction, rather than abstaining. Arbitrability is a jurisdictional issue because it remits the underlying dispute between the parties to a specific, non-judicial forum. By analogy, an allegation that a federal statutory scheme such as Price-Anderson precludes tribal court jurisdiction is a federal statutory issue that should be decided by federal courts without abstention.

Because *National Farmers* and *Iowa Mutual* were applications of comity principles with a long history in federal jurisdiction—and a history that has emphasized practical considerations and favored federal courts deciding federal statutory questions—it is not surprising that this Court in *Strate* made clear that the *National Farmers* requirement is not a rigid rule with three and only three defined exceptions:

> "When, as in this case, it is plain that no federal grant provides for tribal governance of nonmembers' conduct on land covered by *Montana*'s main rule, it will be equally evident that tribal courts lack adjudicatory authority over disputes arising from such conduct. As in criminal proceedings, state or federal courts will be the only forums competent to adjudicate those disputes. * * * Therefore, when tribal-court jurisdiction over an action such as this one is challenged in federal court, the otherwise applicable exhaustion requirement * * * must give way, for it would serve no purpose other than delay." 520 U.S. at 459 n.14.

If that statement is correct for a case like *Strate*, where no federal regulatory scheme covered the type of dispute at issue, it is all the more clear that the tribal exhaustion requirement "must give way" where a federal regulatory scheme precludes tribal court jurisdiction. This is particularly so in cases such as this one where the jurisdictional issue turns upon the language, purposes, and history of a federal statute and does not involve unresolved issues of tribal sovereignty, the interpretation or applicability of Indian

treaties, or other considerations as to which tribal courts might have some special insight or expertise. In such cases, requiring exhaustion "would serve no purpose other than delay."

III. Exhaustion of Tribal Court Remedies Is Exceedingly Burdensome in Nuclear Tort Cases.

Clarification of the tribal exhaustion rule in the manner suggested above or acceptance of petitioner's argument that tribal exhaustion is inappropriate in Price-Anderson cases would avoid the unnecessary expense and delay resulting from requiring exhaustion in nuclear tort cases. The facts of the Shiprock lawsuit against Kerr-McGee and Cyprus Foote provide a vivid example of those burdens.

As in the federal system, a denial of a motion to dismiss for lack of jurisdiction is not an appealable order in the Navajo courts. *Chuska Energy Co. v. Navajo Tax Comm'n*, 5 Navajo Rptr. 98, 102 (1986). In the Shiprock litigation, the tribal district court also denied Kerr-McGee's motion to certify the jurisdictional issue for interlocutory appeal. Accordingly, because it was required to exhaust tribal court remedies, Kerr-McGee has no remedy for an improper exercise of tribal court jurisdiction, except to litigate the case to conclusion and then appeal to the Navajo Supreme Court any adverse decision on jurisdictional grounds, as well as on any grounds relating to the merits.[15] Once those appellate proceedings are over, Kerr-McGee may, if still unsuccessful, revive its federal court action and obtain a federal court ruling on the issue of tribal court jurisdiction. If the federal court rules, as Kerr-McGee has argued, that the tribal court lacked jurisdiction from the very beginning, it will enjoin enforcement of any adverse tribal court

[15] The Court ruled in *Iowa Mutual* that exhaustion of tribal remedies was not complete "[u]ntil appellate review is complete." 480 U.S. at 17. The burdens of the tribal exhaustion requirement would of course be substantially less if the Court were to limit that ruling to cases in which no one contends that a comprehensive federal statutory regime precludes tribal court jurisdiction. In cases such as this one, requiring tribal court defendants to ask the tribal court to dismiss for lack of jurisdiction would impose no significant burden, but the unnecessary burdens of an improper exercise of jurisdiction may begin to be substantial as soon as the tribal court permits the action to go forward.

judgment, and plaintiffs will have to initiate a new Price-Anderson action in state or federal court.

This process will inevitably take a considerable amount of time and expense. As explained above, in the Shiprock litigation, which began in 1995, a trial date has been set for April 2000, but there is of course no assurance that the tribal court proceedings will be completed on schedule. Appellate proceedings can be expected to take at least another year. Thus, exhaustion of tribal court remedies will take at least six years, and there is a very real likelihood that it will take considerably more. Moreover, the tribal district court denied reconsideration of its conclusion that the plaintiffs may proceed under tribal common law rather than under Price-Anderson, despite the Tenth Circuit's contrary opinion. And the tribal district court has put off determination of such basic questions as the applicable standard of care and whether expert testimony will be governed by the *Daubert* standard. See pp. 6-8, *supra*.

The Kerr-McGee litigation is not atypical in requiring long and expensive proceedings in the trial court. The Court can take judicial notice of the fact that nuclear incident litigation typically involves complicated issues of causation and damage, requiring careful attention to the applicable science as well as to the facts of exposure. For example, in *Allen v. United States*, 588 F. Supp. 247 (D. Utah 1984), *rev'd*, 816 F.2d 1417 (10th Cir. 1987), a suit by individual plaintiffs against the United States under the Federal Tort Claims Act for cancer or leukemia allegedly caused by the AEC testing of atomic devices prior to 1963, the case took five years from complaint to judgment, including a three-month trial (with a 7,000-page transcript), the testimony of 98 witnesses, and more than 1600 documentary exhibits. The district court opinion takes up 226 pages of the federal reporter. For another example, the Hanford Nuclear Reservation litigation under Price-Anderson and CERCLA is in its eighth year, having partly survived dispositive motions in a recent opinion assessing plaintiffs' scientific evidence. *In re Hanford Nuclear Reservation Litigation*, No. CY-91-3015-AAM, 1998 U.S. Dist. LEXIS 15028 (E.D. Wash. Aug. 21, 1998). This opinion takes up 1076 pages on the cited computer service.

A defendant like Kerr-McGee cannot be expected to expedite tribal court proceedings by defaulting after losing on the

jurisdictional issue. The stakes in nuclear incident litigation are too high for a defendant to risk all on eventually persuading the federal court to enjoin enforcement of an adverse tribal court judgment. Thus, the tribal court litigation will inevitably be a full adversary proceeding, with extensive discovery and lengthy trial and post-trial proceedings. All this effort will be for nothing if, as Kerr-McGee has argued, the tribal court lacks jurisdiction.

The cost to a defendant like Kerr-McGee in going through long and expensive trial and appellate proceedings that may be unnecessary will be enormous. Plaintiffs face the same burden. Even though the plaintiffs in this case elected to sue in tribal court, we doubt that it makes sense to put plaintiffs in general to the difficult choice of passing up a potentially available tribal court remedy or going through an entire tribal court proceeding that may ultimately be thrown out.

Moreover, relegating both parties to a necessarily long and expensive tribal court proceeding raises the danger that important witnesses will die or become unavailable before proper state or federal court proceedings are brought.

In short, whatever formulation of the tribal exhaustion rule emerges from this case, the Court should take the occasion to make clear that the proper exercise of comity takes account of the burdens of exhausting tribal court remedies.

CONCLUSION

For the foregoing reasons and for the reasons set forth in the petitioners' brief, the judgment of the court of appeals should be reversed.

Respectfully submitted,

MICHAEL R. COMEAU
JON J. INDALL
COMEAU, MALDEGEN,
TEMPLEMAN & INDALL
141 East Palace Avenue
Santa Fe, N.M. 87504-0699
(505) 982-4611

JOHN TOWNSEND RICH
Counsel of Record
RICHARD T. CONWAY
SHEA & GARDNER
1800 Massachusetts Ave., N.W.
Washington, D.C. 20036
(202) 828-2000

Attorneys for Kerr-McGee Corporation

December 8, 1998

APPENDIX

APPENDIX A

IN THE DISTRICT COURT OF THE NAVAJO NATION
JUDICIAL DISTRICT OF SHIPROCK, NEW MEXICO

KEE TOM FARLEY, *et al.*,	)	No. SR-CV-103-95
Plaintiffs,	)	
vs.	)	ORDER
KERR McGEE, *et al.*,	)	
Defendant.	)	June 7, 1996

THIS MATTER came on for consideration of the Defendant's Motion to Dismiss filed on June 05, 1995 which was heard on October 18, 1995. Defendants moved this Court to dismiss this action for lack of subject matter jurisdiction and failure to state a claim upon which this Court may grant relief. As grounds for dismissal, Defendants assert that maintenance of this action in this forum violates express requirements of a comprehensive federal law, the Price-Anderson Act 42 U.S.C. Section 2011 *et seq*.

Plaintiffs filed said complaint on January 12, 1995, seeking damages for wrongful death and injury allegedly resulting from exposure to vanadium and uranium processed at a uranium mill operated by Defendants in Shiprock, New Mexico. On April 26, 1995, Defendants filed a Complaint for Preliminary Injunction and Declaratory Judgment in the United States District Court for the District of New Mexico (CIV 95-0438-MV). Defendants requested the United States District Court to permanently enjoin Navajo Tribal proceedings and declare that the Navajo Tribal Court is without jurisdiction to hear and adjudicate any claims asserted against them in tribal court. Defendants argued that this case constitutes a "public liability" action that is, [2] "any legal liability arising out of or resulting from a nuclear incident" and therefore; the Price Anderson Act applies to this case. Defendants further asserted that

this Tribal Court does not have jurisdiction to resolve nuclear torts because the Price Anderson Act created a federal cause of action to resolve such disputes.

On June 8, 1995, U.S. District Judge Martha Vasquez, in a Memorandum Opinion And Order ruled that, in accordance with the tribal abstention doctrine, the U.S. District Court was required to abstain from further action in this matter until the Tribal Court has ruled on the question of jurisdiction. Defendants then filed a Motion to Dismiss in this Court that was heard on October 18, 1995.

Defendants are foreign corporations that operated a uranium processing mill in Shiprock, New Mexico from 1952 to 1973. The mill was located on tribal trust land within the territorial jurisdiction of the Navajo Nation. Plaintiffs are members of the Navajo Tribe who either worked at the uranium processing site and/or resided within the immediate area of the processing mill. Plaintiffs allege that the deceased, Lucy Farley and Julia Kady, died from exposure to vanadium and uranium processes and various radioactive substances and heavy metals. Plaintiffs are seeking damages for negligence and wrongful death and other tort damages stemming from the alleged operation of the processing mill.

As grounds for dismissal, Defendants assert this Court cannot assert jurisdiction over nuclear torts allegedly committed by Defendants because the federal government has preempted the entire field of nuclear safety through Congressional enactment of the Price Anderson Act. Defendants contend that the Price Anderson Act expressly ceded limited power to the states and that no express delegation was granted to tribal courts and that none can be implied.

[3] Secondly, Defendants argue that Congress created an exclusive method for resolving nuclear tort claims. To wit: the Price Anderson Act requires the filing of any suits involving injury from exposure to nuclear materials to be filed in federal courts or in state courts with absolute and unqualified right of removal to federal court. Defendants further allege no express delegation was granted to tribal courts and none can be implied. Finally, the Defendants argue that comity requires the tribal courts to defer to federal courts.

The arguments Defendants pose is fundamentally flawed because it fails to reconcile their theories with Indian Sovereignty principles as established by Federal Indian policy and United Supreme Court decisions. To determine whether this Court has subject matter jurisdiction, this Court is obligated to carefully examine the Price Anderson Act in light of inherent tribal sovereignty, relevant statutes, case law, and federal policy to determine whether this Court has jurisdiction.

INHERENT TRIBAL SOVEREIGNTY

This history of tribal self-government forms the present right of tribes to govern their members and territories. Although extensive preexisting tribal sovereignty has been limited by tribal inclusion with the United States, Tribal powers of self-government are recognized by the U.S. Constitution, federal legislation, treaties, U.S. Supreme Court decisions, and administrative practice. Such recognition is protected by the federal government to insure continued viability of Indian self-government insofar as governing powers have not been limited or extinguished. Indian Tribes are sovereign in that they are political self governing entities whose powers can be circumvented only by Congress. *U.S. v. Wheeler*, 435 U.S. 313, 323, 98 S.Ct. 1079, 1086, 55 L. Ed. 2d 303, 313 (1978). That is, a Tribe retains its sovereignty until **[4]** Congress divests that sovereignty.

The most basic principle of Indian law is that those powers which are lawfully vested in an Indian Tribe are inherent powers of a limited sovereignty which has never been extinguished. *Id.* at 322-323. Thus, Tribal powers are not delegated powers granted by express acts of Congress. Tribal powers that currently remain are those powers that tribes have always had and remain within the domain of the tribe. In *Oliphant v. Sequenist Indian Tribe*, 435 U.S. 191 (1978) the Supreme held that "Indian tribes still possess these aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status."

TRIBAL CIVIL JURISDICTION OVER NON-INDIANS

The Supreme Court in *Montana v. United States*, 450 U.S. 544, 101 S.Ct. 1245, 67 L.Ed. 2d 493 (1981) articulated the principle

that underlies tribal court civil jurisdiction over non-Indians. The Crow tribe of Montana, by a tribal regulation sought to prohibit hunting and fishing within its reservation by anyone who is not a member of the tribe. The tribal regulation applied to nonmembers of the tribe that included lands within the reservation owned in fee simple by non-Indians. Meanwhile, Montana continued to assert its authority to regulate hunting and fishing by non-Indians within the Crow reservation. The United States in its own right and as a fiduciary for the tribe filed an action seeking declaratory judgment quieting title to the bank of the Big Horn River and to establish that the tribe and the United States have sole authority to regulate hunting and fishing within the reservation. They sought to force Montana to obtain tribal permission before issuing hunting and fishing licenses for use on the reservation.

The *Montana* court addressed the sources and scope of the power of an Indian tribe to regulate hunting and fishing by non-Indians within its reservation owned in fee **[5]** simple by non-Indians. In doing so, the *Montana* court analyzed the scope of a tribe's power to exert civil jurisdiction over non-Indians within their reservation boundaries by stating unequivocally that "to be sure, Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands." *Id.* at 209.

The *Montana* court then announced that tribes may regulate the activities of non-members via taxation, licensing, or other means. A tribe may also exercise civil jurisdiction over non-members who enter consensual relationships with the tribe or its members, through commercial dealings, contracts, leases, or other arrangements. A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee land within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or health or welfare of the tribe. *Id.* at 209.

NAVAJO TRIBAL AUTHORITY

The Navajo Nation is a sovereign and self-governing society that predates the coming of the Europeans and the United States Constitution. The United States government recognized the Navajo

Nation's sovereign status when it entered into two treaties with the Navajo Nation in 1850 (9 Stat. 974) and 1868 (15 Stat. 667). Treaty making between Indian tribes and Europeans and latter the United States government represented an agreement between two sovereign independent nations. *F. Cohen, Handbook of Federal Indian Law* 232 (1982). The Court of Appeals of the Navajo Nation (now the Supreme Court) pronounced this principle as follows: "When sovereign Indian nations dealt with the United States by treaty, they did so in an international law sense. Further, they (tribes) did not receive their lands and powers **[6]** from the United States but only ceded lands and privileges to it." *Benally v. John*, Nav.R. 39, 4 N.L.R. 22 (Nav.Ct.App. 1983).

Although the Navajo Nation exercised self-government long before the arrival of Europeans, a Tribal Council was not formally established until 1926. The Navajo Tribal Council established the Navajo tribal courts and granted them authority to exercise civil jurisdiction over all actions that occur within its territorial jurisdiction. This authority to exercise jurisdiction is coextensive with that of the Navajo Nation as a sovereign. *Deal v. Blatchford*, 3 Nav.R. 159, 3 N.L.R. 91 (Nav.Ct.App. 1982).

The Navajo Nation's declaration of civil jurisdiction is found at Title 7 of the Navajo Tribal Code, section 253 (2) (1985) which provides: The District Courts of the Navajo Nation shall have original jurisdiction over . . . . all civil actions in which the Defendant is a resident of Navajo Indian Country or has caused an action to occur within the territorial jurisdiction of the Navajo Nation. Territorial jurisdiction of the Navajo Nation shall extend to Navajo Indian Country, which is defined as all land within the exterior boundaries of the Navajo Indian Reservation or of the Eastern Navajo Agency, all land within the limits of dependant Navajo Indian communities, all Navajo Indian allotments, and all other land held in trust for, owned in fee by, or leased by the United States to the Navajo Tribe or any band of Navajo Indians. 7 N.T.C. Sec. 254.

Thus, the Navajo Tribal Code grants tribal courts jurisdiction over civil cases involving non-Indians if the action in which the defendant has caused an action to occur within the territorial jurisdiction of the Navajo Nation. It is undisputed that Defendants

obtained a license to operate a uranium mill in Shiprock, New Mexico from 1952 through 1973. It is also an undisputed fact that Shiprock is located within the [7] territorial jurisdiction of the Navajo Nation. Plaintiffs alleged that Defendant's uranium mill operation resulted in sickness and death; therefore, the authority to exercise jurisdiction by this Court is satisfied in accordance with 7 N.T.C. Sections 253, 254.

Moreover, the Navajo Nation "has the power to exercise civil authority over the conduct of non-Navajos where the conduct threatens or has some direct effect on the political integrity of the Navajo Nation." *U.S. v. Montana, Supra.* The conduct Defendants allegedly committed has a direct effect on the political integrity of the Navajo Nation. Political integrity is dependent on the respect, honesty and faith the Navajo people entrust in the Navajo government to protect their rights in accordance with Navajo common law. A basic Navajo common law is that one who is found responsible for inflicting harm on another person must pay the victim for the harm to restore harmony. If the Navajo tribal courts cannot provide a forum to address allegations of tortuous conduct and provide remedies where appropriate, the political integrity of the tribal government is seriously compromised.

Furthermore, tribal Courts have civil jurisdiction over non-Indians who enter consensual relationships with the tribe or its members if the cause of action arises on the reservation. *U.S. v. Montana, Supra.* Defendants admitted that they entered into a lease with the Navajo Nation to operate the uranium mill. Defendants freely decided to enter a consensual agreement with the Navajo Nation to operate the mill in Shiprock. Any business deals, contracts, or leases made with the Navajo Nation that are designed to operate on the Navajo Nation subject those businesses to Navajo tribal jurisdiction. *Arizona Public Services v. Office of Navajo Labor Relations*, Slip. Op. A-CV-08-87 (Navajo Supreme Ct. 1990).

In conclusion, Navajo Nation tribal courts have the authority and power to [8] exercise jurisdiction over non-Indians where a claimant alleges that a non-Indian committed a tortuous act within the exterior boundaries of the Navajo Nation.

Any other conclusion would diminish the Navajo tribal court's ability to play an important and essential role in tribal self-government, contrary to Congressional policy of supporting Indian self-government and self determination by recognizing that tribal courts constitute an integral part of tribal sovereignty. *In National Farmers Union Insurance Co., v. Crow Tribe of Indians*, 471 U.S. 845, 105 S.Ct. 2447, 85 L.Ed. 2d 818 (1985), the Supreme Court articulated the policy of encouraging development of tribal courts by making them the primary focus for adjudication where tribal jurisdiction is being challenged so that they have the first opportunity to evaluate the factual and legal basis for the challenge. *Id.* at 856-857. The Supreme Court in *Iowa Insurance Co. v. LaPlante*, 480 U.S. 9, 107 S.Ct. 971, 94 L.Ed.2d 10 (1987), reaffirmed that Indian tribal courts have a role in tribal sovereignty and self-government. And unlike criminal jurisdiction, tribal civil jurisdiction over activities of non-Indians on reservation trust land presumptively lies in tribal Court unless affirmatively limited by specific treaty provisions or federal statute.

APPLICABILITY OF GENERAL JURISDICTION STATUTES

To determine whether Plaintiff's claims are preempted by a comprehensive federal law, the Price Anderson Act, so as to preclude this Court from exercising jurisdiction, the Court needs to examine ". . . legisiative history of the federal statute at issue and language expressed on the face of the statute to determine whether congress has divested tribal courts of jurisdiction." *Pela v. Peabody Coal Company*, Slip. Op. A-CV-78-89 (Navajo Nation Supreme Ct. 1990). It is essential for this Court to examine the Price Anderson Act to discern how it affects the sovereignty of the Navajo [9] Nation with the preservation of tradition and culture in mind.

Federal General Jurisdictional statues do not apply to tribes absent specific language which include the tribes. In *Becenti v. Vigil*, 902 F.2d 777 (10th Cir. 1990), petitioner, at the outset, filed a petition against employees of the Bureau of Indian Affairs. Defendants were successful in removing the case to the federal district court who in turn, dismissed the complaint for lack of jurisdiction. Plaintiff appealed to the 10th Circuit Court of Appeals

which held that removal was not authorized by 28 U.S.C. Sec. 1442 (a)(1), the statue providing for removal from "state court" of actions against officers of the United States or agency thereof. The Court in *Becenti* stated "[this section] speaks only of removal of actions brought in "state" courts and cited several cases that have interpreted the "state courts" language in both section 1441 and 1443 (1) as not accompanying actions commenced in courts other than those of the fifty states." The 10th Circuit was very careful and did not want to expand the jurisdiction of federal courts beyond congressional mandate." *Id.* at 780.

In *Pela, Supra,* the Court addressed the issue of whether Congress, by granting concurrent state and federal jurisdiction over certain ERISA claims divested tribal courts of jurisdiction to hear those claims. Pela had filed a petition in tribal court alleging four causes of action. One claim was that defendant violated 29 U.S.C. Sections 1132(a)(1)(B) & 1140. Defendant filed a petition to remove the case to federal court on the grounds of federal question jurisdiction which was granted by the tribal court. Pela appealed to the Navajo Supreme Court. The Navajo Supreme Court held that 29 U.S.C. Sec. 1132(a)(1)(B), which did not mention Indian tribes, does not bar Indian tribal courts from hearing such claims. The Court reasoned that since Pela filed his suit pursuant to Sec. 1132(a)(1)(B) which provided for concurrent jurisdiction, **[10]** petitioner was permitted to sue in a non federal court that may, in turn, apply local law. In contrast, Congress desired uniformity in enforcement and regulation when it provided for exclusive jurisdiction regarding 29 U.S.C. Sec. 1132(e)(1) claims; consequently, the state and tribal courts have no jurisdiction where a federal statute provides for exclusive jurisdiction.

The Price Anderson Act, similar to ERISA does not mention Indian Tribes. This Court is not willing to construe "state courts" contained in the Price Anderson Act to include Indian tribes. Thus, the Court will examine the Price Anderson Act to determine whether it provides for state and federal concurrent jurisdiction. If it is found that it provides for exclusive jurisdiction, then tribal courts may be are barred from exercising jurisdiction over this claim. On the other hand, if it is found that there is concurrent jurisdiction, then this Court will be persuaded that the Price

Anderson Act does not bar this court from exercising jurisdiction over this claim.

THE PRICE ANDERSON ACT 42 U.S.C. SECTION 2011 *et seq.*

Defendants argue that Plaintiff's claims are subject to the Price-Anderson Act because said action seeks to hold defendants liable for injuries allegedly caused from exposure to vanadium, uranium and various radioactive substances and heavy metals resulting from the Shiprock Mill operations. Defendants assert that this is a "public liability action" pursuant to the Price Anderson Act. 42 U.S.C. Sec. 2210(n)(2) which provides an exclusive remedy for such actions with an automatic right of removal if the claim was filed in state court.[1]

[11] Defendants cited *In re TMI Litigation Cases Consolidated II*, 940 F.2d 832 (3rd Cir. 1991) to support its claim that 42 U.S.C. Sec. 2210(n)(2) is the exclusive remedy for "public liability" actions and that Congress created a federal cause of action for such claims when it amended the Act in 1988. According to the 3rd Circuit Court, under the terms of the 1988 Amendments Act "public liability action" encompasses "any legal liability of any person who may be liable on account of a nuclear incident. *Id.* at 855. The Court further observed that given the breadth of this definition, if a plaintiff fails to state a public liability claim potentially compensable under the Price Anderson Act, then plaintiff has no such claim at all. The *TMI* Court concluded that a claim growing out of any nuclear incident is compensable under the terms of the Amendment or it is not compensable at all and no state cause of action based on public liability exists after the 1988 amendments.

---

[1] Public liability is defined as "any legal liability arising out of or resulting from a nuclear incident. Sec. 2014(w). Nuclear incident is defined as "any occurrence, including an extraordinary nuclear occurrence, within the U.S. causing . . . bodily injury, sickness, decease, **[11]** death, or lossof or damage to property, or loss of use of property, arising out of or resulting from the radioactive, toxic, explosive, or other hazardous properties of source, special nuclear, or byproduct material. Section 2014(q). Byproduct material includes "tailings or waste produced by the extraction or concentration of uranium or varnium from any ore processed primarily for its source material content.

DEVELOPMENT OF ATOMIC ENERGY

In 1946 Congress enacted the Atomic Energy Act of 1946, 60 Stat. 755, whereby the federal government monopolized the use, control and ownership of nuclear technology. The Atomic Energy Commission (herein after AEC) was given exclusive jurisdiction to license the transfer, delivery, receipt, acquisition, possession and use of nuclear material. In 1954, the Atomic Energy Act was amended, 68 Stat. 919, to encourage private construction, ownership and operation of nuclear power plants for peaceful purposes while exclusive jurisdiction to regulate and license nuclear safety **[12]** was reserved to the AEC.

In 1957 Congress passed the Price-Anderson Act as an amendment to the Atomic Energy Act Pub. L. 85-256, 71 Stat. 576, to assure adequate public compensation in case of a nuclear accident, and to limit the liability of private industry in order to encourage private participation in the development of nuclear energy. An indemnification scheme was established under which operators of licensed nuclear facilities could obtain up to $60 million in private financial protection against suits. The government would then provide indemnification for the next $500 million of liability, and the resulting $560 million would be the limit of liability for any one nuclear incident. The Act was amended again in 1959, "to clarify the responsibilities" of the states and the AEC with respect to the regulation of by-product, source, and special nuclear material. 42 U.S.C., Sec. 2021(a)(1). States were now allowed to regulate certain nuclear material in quantities not sufficient to form a critical mass. The AEC retained the exclusive jurisdiction over disposal of certain by-products, source, or special nuclear materials.

The 1966 Amendments to the Price-Anderson Act authorized the AEC to require defendants covered by the financial protection and indemnity to waive certain state-law defenses otherwise available. Said amendments responded to concerns raised regarding the adequacies of state law remedies in administering compensation for a victim of a major nuclear incident. Congress required such waivers out of concern that state-laws, such as the negligence standard of liability, were ill-suited to the problems of nuclear hazards. In 1974 the AEC was abolished and the regulatory duties of the AEC were assigned to the Nuclear Regulatory

Commission (NRC). In 1988 42 U.S.C. Sec. 2210 (n)(2) was amended to provide that the federal courts shall have original jurisdiction **[13]** over public lability claims.

Defendants contend the Atomic Energy Act and the Price-Anderson Act provide a comprehensive federal regulatory program for the licensing and operation of nuclear-related facilities and claims arising from their activities.

FEDERAL PREEMPTION

The Court must now determine whether or not the federal government's regulation of industries associated with the use, production and control of nuclear energy are so pervasive as to preclude this Court from exercising jurisdiction. Federal preemption occurs in a few specific ways. First, Congress has the authority to preempt within congressional limits the authority of states by express terms. Secondly, where there is no explicit preemptive language, the intention of Congress may be found where the scheme of federal regulation is so pervasive as to make reasonable the inference that Congress left no room for the state to supplement it. Thirdly, preemption is found where state laws conflict with federal laws or where the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress. *Pacific Gas & Electric Company v. State Energy Resources Conservation & Development*, 461 US 190, 175 L.Ed 2d 752, 103 S.Ct. 1713 (1983).

As discussed above, a challenge to tribal court jurisdiction based on a federal statute that does not include Indian tribes requires another step in the analysis. The *Pela* court held that where a federal statute does not include Indian tribes but confers concurrent jurisdiction upon the federal and state courts, the tribal courts may exercise jurisdiction over the claim. Since this Court has already found that the Price-Anderson Act does not specifically include Indian tribes and will not expand the language of "states" as used in the Price-Anderson Act, an analysis on whether the Act provides for **[14]** federal and state concurrent jurisdiction is necessary. The third method of finding preemption will be discussed following the discussion of concurrent jurisdiction.

CONCURRENT JURISDICTION

The Price-Anderson Act is not about exclusivity, rather it confers concurrent jurisdiction to both the states and federal courts where indeed there is a public liability action. The Court in *In Re TMI Consol. II, Supra.*, acknowledged that the retroactivity features of the Amendment Act promote "equitable and uniform treatment of victims,"; "the orderly distribution of funds"; and, "avoidance of similar issues in multiple jurisdictions that may occur in the absence of consideration". The features reveal Congressional concern with multiple claims and the cost of dealing with the duplicative issues in several state courts. The foregoing features would not be factors where only one person is affected by the nuclear incident or where all claims are filed in a single state court. Thus, it is possible and sometimes more efficient for a state to resolve a public liability action. *Id.* at 861.

An example of how and when resolution of a public liability claim in a state court is more efficient than removing the claim to federal court occurred in *Akins v. Rodriquez*, 15 F3d 883 (9th Cir. 1994). Plaintiff filed a claim in California state court against American Nuclear Insurers (ANI) and, current and former employees of nuclear power plant's owner and operator. Said claim was based upon contamination of stream by discharge of radioactive material. ANI provided insurance to nuclear power plants licensed by the Nuclear Regulatory Commission as required by the Price Anderson Act. ANI removed the case to federal court. The federal district court issued a stay and remanded the case back to state court. ANI petitioned the 9th Circuit Court of Appeals for a writ of mandamus challenging the remand order.

[15] The 9th Circuit Court first considered whether abstention was proper under *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 96 S.Ct. 1236, 47 L.Ed.2d 483 (1976). This case set out factors which should be considered by a federal district court in determining whether to defer to a concurrent state proceeding. The 9th Circuit court held that the district court did not abuse it discretion in ordering the remand because the decision was based on the concern the dangers of piecemeal litigation since litigation of *Akins I* was pending in state court to determine the issue of whether certain injuries from radiation were

sufficient to support a cause of action under California tort law. Moreover, *Akin I* had been pending in state court for four years and there had been little progress in the federal litigation and the forum in Sacramento was equally convenient. Importantly, the court found that state law questions predominate in the federal action and, state substantive law is applied in public liability actions, unless such law is inconsistent with the Price-Anderson Act. *Id.* at 887.

Nor does the Price-Anderson Act preclude the use of state remedies. In *Silkwood v. Kerr-Mcgee Corporation*, 464 U.S., 78 L Ed 2d 443, 104 S.Ct. 615 (1984), the Supreme Court held that state-authorized award of punitive damages arising out of escape of plutonium from nuclear facility was not preempted by federal law. The Court looked at the legislative history noting that the 1966 amendments made it clear that state remedies were still available, notwithstanding AEC's regulating and licensing authority. A Joint Committee Report regarding the relationship between the Act and existing state tort law was cited as follows: "Since the rights of third parties who are injured are established by state law, there is no interference with the state law until there is likelihood that the damages exceed the amount of financial responsibility **[16]** required together with the amount of the indemnity. At that point the federal interference is limited to the prohibition of making payments through the state courts and to pro rating the proceeds available. *S. Rep No* 296, 85th Cong. 1st Sess. 9 (1957), U.S.C. Cong and Admin News 1957, pp 1803, 1810. *Id.* at 456.

In determining that punitive damages have always been part of traditional tort law that have not been specifically supplanted by the Act, the Court stated, "It is difficult to believe that Congress would, without comment, remove all means of judicial recourse for those injured by illegal means." *Id.* at 454. In conclusion, the Price Anderson Act has not totally exempted states from hearing public liability claims; thus, there is no absolute exclusive federal court jurisdiction under the PAA.

The Navajo tribal court, similarly, are not precluded from hearing torts allegedly arising from a defendant's conduct within the territorial jurisdiction of the Navajo Nation.

STATE/TRIBAL LAW DOES NOT CONFLICT WITH FEDERAL LAW

The third way preemption may occur is where state laws conflict with federal laws or where state law stands as an obstacle to the accomplishment of Congressional objectives. In *Pacific Gas & Electric Co.* Supra, the Supreme Court held that a California statute imposing a moratorium on the certification of new nuclear plants until the state energy commission finds that there exists a demonstrated technology or means for the disposal of high level nuclear was not preempted by the Atomic Energy Act. Petitioner argued that the federal government was the sole regulator of all matters matters and the statute was preempted because it attempted to regulate the nuclear industry. The Court accepted the state's avowed economic rather than safety purpose as the rationale for enacting the statue and held that the statute lied outside the [17] federally occupied field of nuclear safety regulation. The Court reasoned that the Atomic Energy Act, along with all of its revisions, Congress has preserved the dual regulation of nuclear-powered electricity generation: the Federal Government maintains complete control of the safety and "nuclear" aspects of energy generation. Whereas the States exercise their traditional authority over economic questions such as the need for additional generating capacity, the type of generating facilities to be licensed, land use, and rate making.

In the case at bar, the Petitioners, likewise are not attempting to regulate the nuclear industry which is preempted by the Price Anderson Act. Petitioner seek to redress harm they allegedly suffered as a result of the Shiprock Mill operations. Moreover, an assumption of jurisdiction by the Navajo Tribal Court to adjudicate a common law tort that does not conflict the federal government's goal of regulating nuclear safety concerns.

FEDERAL REGULATORY SCHEME

Defendant contends in enacting the Atomic energy Act and the Price Anderson Act, Congress declared that the possession, use and production of atomic energy and nuclear materials were vital to the United States and must be subject to federal control and regulation. Also, in its efforts to encourage private entities to participate in the

development of the United States' nuclear resources, the federal government created a comprehensive system for resolving nuclear tort claims.

This Court does not disagree with these statements, the legislative history of the Acts indeed set forth the intent of Congress. However, Defendants arguments are misdirected. Petitioner's claim does not attempt to regulate the nuclear industry. In fact, to do so would be a physical impossibility because the Shiprock Mill has not been [18] operating for over 20 years. Instead plaintiffs are asking this Court to adjudicate a traditional common law tort that has not been precluded by the Price Anderson Act. As discussed previously, the Price Anderson Act did not preclude the use of state remedies nor did it preclude the use of Navajo Nation remedies.

Moreover, Defendant's argument that this Court's jurisdiction is foreclosed by the Treaty of 1850 borders on an outdated and patronizing attitude toward Indian tribes. Defendants argue that since the Navajo Nation depends on the United States for its protection and defense it must defer to a comprehensive federal scheme created for the resolution of nuclear torts. Apparently, Defendant's rationale is that the Atomic Energy Act and the Price Anderson Act were designed to protect the common defense and security of all United States citizens and exercise of tribal jurisdiction is a violation of the 1850 Treaty since the Navajo Nation agreed that the responsibility of its defense against its aggressors would rest in the United States. This Court is confused. Are Defendants asserting that exercise of jurisdiction over an alleged tort resulting form a Uranium Mill within the territorial jurisdiction of the Navajo Nations is an act of war?

Further, Defendant's argument implies that since the Navajo Nation entered into a treaty with the United States for protection from foreign aggressors, the Navajo people must sacrifice their lives for the development of nuclear energy. Indeed, Congress declared that the development of nuclear energy as paramount concern in enacting the Acts, but it was not to be developed at all costs, certainly not at all human costs. Defendants also argue that nuclear torts are new and has no part in Navajo traditions. Harm resulting from new technology does not automatically foreclose a court from providing a forum for Navajos who may have been harmed by new

technology. The Navajo Nation is constantly bombarded by new technology and the [19] Navajo courts have been able to deal with them as they arise. The fact that nuclear technology is not a Navajo tradition does not preclude the Navajo courts from administering justice. In sum, the Atomic Energy Act and the Price Anderson Act do not preempt this Court from adjudicating torts arising within the territorial jurisdiction of the Navajo Nation.

NON-PUBLIC LIABILITY ACTION

Even if defendant's argument that the Price Anderson Act applied was accepted, this Court would not be precluded from hearing this claim because the factual prerequisite of "public liability" action has not been shown to the court. The factual prerequisite of the statute requires first that "public liability" be found before it is covered by the Price-Anderson Amendments umbrella. For a private company to be eligible for a public liability claim, the company must have an agreement with the federal government to handle nuclear material. 42 U.S.C. Sec. 2021(C)4. The agreement includes licensing; guarantee of insurance; and, indemnification by the federal government. Those companies that did not obtain a license or those that did not obtain federal indemnification do not fall with the "public liability" scope and the Act is not applicable. The NRC was given discretion on whether to require licensed plants to maintain financial protection. Hence, government indemnification is available only to those were are indemnified. Section 2210 (e).

Accordingly, at the outset a federal definitional matter must be resolved where an action asserts liability arising out of a nuclear incident. To wit: is this a public liability action? If the answer is yes, the Price Anderson Act is applicable and no action for injuries caused by the release of radiation from a federally licensed nuclear power plant separate from the federal public liability action created by the 1988 amendments [20] is allowed.

It is this Court's opinion that Defendants failed to show that the Plaintiffs have a public liability claim subject to removal that is potentially compensable under Price Anderson Amendment Act. Defendants have not shown the Court that they were licensed with the federal government nor have they shown that they were covered

by federal indemnity insurance. Moreover, public liability claims that are compensable pursuant to the Price-Anderson Act involves the federal government as a named defendant so that the federal government may indemnify the plaintiffs and channel liability in accordance with the scheme. Thus far in this case, neither the NRC or the Secretary of Energy have been named or brought in as defendants. This Court concludes that this claim does not fall with the scope of a public liability action and the Price Anderson Act is not applicable here. Since the Price-Anderson Act gives federal courts original jurisdiction over public liability actions, state courts and tribal courts are not precluded from hearing "non-public liability" claims.

COMITY

In *Pela*, the Navajo Supreme held that the doctrine of comity applies only in actions properly pending in "the courts of another sovereign." Comity is sparingly applied out of respect and deference to tribal sovereignty. For the reasons stated above, this Court is not convinced that the Price Anderson Act bars the Navajo tribal court from hearing this action case. Tribal Court jurisdiction is an important and integral part of the tribe's sovereign status. Further, to allow the federal courts to determine substantive Navajo common law would seriously undermine Navajo tribal sovereignty. In conclusion, to extend courtesy based on comity in this case would not be in the best interest of the Navajo tribe.

[21] CONCLUSION

Congress enacted the Price Anderson Amendment Act, to create a body of federal substantive law regulating nuclear activities to ensure uniformity in enforcement of nuclear safety and to provide compensation over public liability claims. Exercise of tribal court jurisdiction does not conflict with nor interfere with that Congressional intent. As in *Pela*, those areas of state and federal public liability claims are exclusive to the federal courts. Thus, Navajo tribal jurisdiction is not precluded by the Price Anderson Act.

IT IS HEREBY ORDERED that the Defendants' Motion to Dismiss this case is hereby DENIED.

SO ORDERED this 6th day of June, 1996.

/s/ Judge Lorene Ferguson
Shiprock Judicial District Court

Supreme Court, U.S.
FILED
DEC 8 1998
CLERK

No. 98-6

In The

Supreme Court of the United States

October Term, 1998

EL PASO NATURAL GAS COMPANY, A DELAWARE CORPORATION; CYPRUS FOOTE MINERAL COMPANY, A PENNSYLVANIA CORPORATION; AND CYPRUS AMAX MINERALS COMPANY, A DELAWARE CORPORATION,

Petitioners,

v.

LAURA NEZTSOSIE; ARLINDA NEZTSOSIE; AND ZONNIE MARIE DANDY RICHARDS, INDIVIDUALLY AND AS REPRESENTATIVE OF THE ESTATE OF HAROLD J. RICHARDS, SR.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR THE STATES OF SOUTH DAKOTA, CALIFORNIA, MICHIGAN, MONTANA, NEVADA, NEW YORK, UTAH AND WYOMING AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

MARK W. BARNETT
Attorney General
State of South Dakota

JOHN PATRICK GUHIN*
Deputy Attorney General
500 East Capitol Avenue
Pierre, South Dakota 57501-5070
Telephone: (605) 773-3215

**Counsel of Record*

[Additional counsel listed on inside cover]

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

22 pp

DANIEL E. LUNGREN
Attorney General
State of California

FRANK J. KELLEY
Attorney General
State of Michigan

JOSEPH P. MAZUREK
Attorney General
State of Montana

FRANKIE SUE DEL PAPA
Attorney General
State of Nevada

DENNIS C. VACCO
Attorney General
State of New York

JAN GRAHAM
Attorney General
State of Utah

GAY WOODHOUSE
Acting Attorney General
State of Wyoming

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTRODUCTION 1

INTEREST OF AMICI STATES 1

SUMMARY OF ARGUMENT 2

ARGUMENT 4

A FEDERAL COURT SHOULD NOT REQUIRE EXHAUSTION OF TRIBAL COURT REMEDIES, WHERE, AS HERE, THE GRANT OF RELIEF BY THE TRIBAL COURT IS PRECLUDED BY FEDERAL LAW 4

CONCLUSION 16

TABLE OF AUTHORITIES

Page

CASES CITED:

Brendale v. Confederated Tribes and Bands of the Yakima Nation, 492 U.S. 408 (1989) 2

Browder v. Director, Department of Corrections, 434 U.S. 257 (1978) 14

Colorado River Water Conservation District v. United States, 424 U.S. 800 (1976) 2, 5, 6

County of Allegheny v. Frank Mashuda Company, 360 U.S. 185 (1959) 5

Duro v. Reina, 495 U.S. 676 (1990) 15

Federal Power Commission v. Tuscarora Indian Nation, 362 U.S. 99 (1960) 4, 9

In re TMI Litigation Cases Consolidated II, 940 F.2d 832 (3d Cir. 1991) 11, 12

Iowa Mutual Insurance Co. v. LaPlante, 480 U.S. 9 (1987) 6

Judice v. Vale, 430 U.S. 327 (1977) 6

Lower Brule Sioux Tribe v. South Dakota, 104 F.3d 1017 (8th Cir. 1997), *cert. denied*, 118 S.Ct. 64 (1997) 2

McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164 (1973) 15

Montana v. United States, 450 U.S. 544 (1981) 15

Moses H. Cone Memorial Hospital v. Mercury Construction Corp., 460 U.S. 1 (1983) 5, 8, 12

National Farmers Union Insurance Cos. v. Crow Tribe, 471 U.S. 845 (1985) 3, 6, 7, 8, 9

TABLE OF AUTHORITIES – Continued

Page

Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978) 8

Seminole Tribe v. Florida, 517 U.S. 44 (1996) 15

Sisseton-Wahpeton Sioux Tribe v. United States, 895 F.2d 588 (9th Cir. 1990), *cert. denied*, 498 U.S. 824 (1990) 14

Smart v. State Farm Ins. Co., 868 F.2d 929 (7th Cir. 1989) 10

South Dakota v. Yankton Sioux Tribe, 118 S.Ct. 789 (1998) 2

Strate v. A-1 Contractors, 520 U.S. 438 (1997) ..... *passim*

U.S. Department of Labor v. Occupational Safety & Health Review Commission, 935 F.2d 182 (9th Cir. 1991) 10

United States v. American Railway Express Co., 265 U.S. 425 (1924) 13, 14

United States v. Baker, 63 F.3d 1478 (9th Cir. 1995) 10

United States v. Dion, 476 U.S. 734 (1986) 9

United States v. Mottaz, 476 U.S. 834 (1986) 14

CONSTITUTION:

U.S. Const., Art. I, § 8, cl. 3 15

STATUTORY REFERENCES:

28 U.S.C. § 1331 ..... 5, 6

42 U.S.C. § 2210(n)(2) 12

42 U.S.C. § 2014(hh) 11

TABLE OF AUTHORITIES – Continued

Page

42 U.S.C. § 2014(q) 5, 11

42 U.S.C. § 2014(w) 11

OTHER AUTHORITIES:

F. Cohen, *Handbook of Federal Indian Law* 399 (1982 ed.)' 10

20 James Wm. Moore, et al., *Moore's Federal Practice* § 304.11[3][b] (3d ed. 1998) 13

Slade, *Dispute Resolution in Indian Country: Harmonizing National Farmers Union, Iowa Mutual, and the Abstention Doctrine in the Federal Courts*, 71 N.D. L. Rev. 519 (1995) 2

S. Rep. No. 218, 100th Cong., 1st Sess. 2 (1987) 11

Wrend and Smith, *American Indian Law Deskbook* (2d ed. 1998) 1, 8

INTRODUCTION

The states of South Dakota, California, Michigan, Montana, Nevada, New York, Utah and Wyoming, through their respective Attorneys General, respectfully submit a brief amicus curiae pursuant to Supreme Court Rule 37.4 in support of Petitioners.

INTEREST OF AMICI STATES

This case raises the issue of when a person or entity may be forced to exhaust tribal remedies before proceeding to federal court. The issue is of substantial concern to the states. First, states and citizens of states have found themselves the targets of repeated suits in tribal courts.[1] Second, states and citizens of the states are faced with repeated attempts by the tribe to exercise jurisdiction over nonmembers of the tribe and divest the states of their historic jurisdiction. *See, e.g., South Dakota v. Yankton*

[1] *See* Wrend and Smith, *American Indian Law Deskbook* 149 n.117 (2d ed. 1998) (listing cases brought in tribal court against citizens, state employees, and others). *See also Montana v. Gilham*, 133 F.3d 1133 (9th Cir. 1998) (state immune from tort action in tribal court); *Archambault v. Montana*, No. CV-98-51 (Ft. Belknap Tribal Court) (action seeking prospective and retroactive relief against state child support agency and personnel); *Covers Up v. Montana*, Nos. 98-112 and 98-118 (Crow Tribal Court) (actions seeking prospective relief against state child support agency and personnel); *Crooked Arm v. Walters*, No. 96-359 (Crow Tribal Court) (action seeking damages for off-reservation activity of Montana state child protective services personnel); *After Buffalo v. State*, No. ___ (Blackfeet Tribal Court) (pending action alleging misconduct of Montana state child welfare employee).

Sioux Tribe, 118 S.Ct. 789 (1998) (tribal attempt to divest state of jurisdiction over proposed solid waste facility on fee land); *Lower Brule Sioux Tribe v. South Dakota*, 104 F.3d 1017 (8th Cir. 1997), *cert. denied*, 118 S.Ct. 64 (1997) (tribal attempt to divest state of jurisdiction over hunting and fishing on Corps of Engineers' land and fee land); *Brendale v. Confederated Tribes and Bands of the Yakima Nation*, 492 U.S. 408 (1989) (tribal attempt to divest local government of zoning jurisdiction). Subjecting such disputes to initial tribal court jurisdiction would be costly and would not materially advance the public interest.

Moreover, it threatens to unbalance the playing field. A commentator has presciently noted that "One may speculate on the significance of this power by imagining how the civil rights controversies of the 1960s and 1970s would have developed if the cases were required to be litigated initially in state courts." Slade, *Dispute Resolution in Indian Country: Harmonizing National Farmers Union, Iowa Mutual, and the Abstention Doctrine in the Federal Courts*, 71 N.D. L. Rev. 519 n.1 (1995).

SUMMARY OF ARGUMENT

Federal courts have a "virtually flagging obligation" to exercise jurisdiction in cases which have legally come before them. *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 817 (1976). Nonetheless, this Court has developed exceptions to that general principle with regard to disputes in state courts and, drawing on

the same principles, among others, has developed exceptions to this general rule when the dispute concerns a case which has been, or might be, filed in tribal court.

Thus, in *National Farmers Union Insurance Cos. v. Crow Tribe*, 471 U.S. 845 (1985), this Court found that a federal case challenging the jurisdiction of the tribal court should be held in abeyance or dismissed pending further proceedings in the tribal court. The Court noted, essentially, that the question of whether the tribe could legitimately exercise civil subject matter jurisdiction in the case had not been established, so exhaustion would be required; if it had been established that no tribal jurisdiction existed, exhaustion would have been "automatically foreclosed." *Id.* at 855.

The Court also noted, consistent with prior decisions in the state-federal context, that it did not suggest that exhaustion would be required where the assertion of tribal jurisdiction was motivated by a desire to harass, was conducted in bad faith, when the action was "patently violative of express jurisdictional prohibitions" or when exhaustion would be futile because there was no opportunity to challenge the Court's jurisdiction. *Id.* at 856 n.21.

Strate v. A-1 Contractors, 520 U.S. 438 (1997), made it clear that the term "express . . . prohibitions" did not require a specific statement by Congress precluding tribal jurisdiction but rather referred to any instance in which the tribe was precluded, as a matter of federal common or statutory law, from exercising jurisdiction.

Federal statutory law does, in fact, prohibit the tribes from exercising jurisdiction over "nuclear incidents."

Federal Power Commission v. Tuscarora Indian Nation, 362 U.S. 99, 116 (1960), establishes that laws of general application apply to Indians and Indian tribes, and, of course, the Price-Anderson Act is such a law. The Price-Anderson Act, in turn, which comprehensively regulates the "nuclear incidents" at issue here, leaves no room for the existence of a tribal cause of action. Thus, the tribal court was precluded, as a matter of law, from hearing a case arising from a tribal cause of action.

Nor could the tribal court hear a case arising under the Price-Anderson Act itself. First, Respondents here failed to appeal the injunction of the district court which prohibited the tribal court from hearing a case arising under the Price-Anderson Act. The court of appeals simply lacked jurisdiction to reverse an unappealed decision of the district court.

Even if the issue is reached, the decision is the same. Tribal courts may exercise only their inherent authority and have never had, nor were they granted by the Constitution, any authority to enforce federal law. Thus, they lack jurisdiction to enforce the provisions of the Price-Anderson Act in any event.

ARGUMENT

A FEDERAL COURT SHOULD NOT REQUIRE EXHAUSTION OF TRIBAL COURT REMEDIES, WHERE, AS HERE, THE GRANT OF RELIEF BY THE TRIBAL COURT IS PRECLUDED BY FEDERAL LAW.

This case presents the issue of whether a federal court should stay its jurisdiction so that a tribal court

may determine whether to impose liability as a result of a "nuclear incident" as defined by the Price-Anderson Act, as amended. *See* 42 U.S.C. § 2014(q). Because federal law precludes the tribal court from granting relief in any instance, it was improper for the federal court below to abstain from exercising its authority under 28 U.S.C. § 1331 and to fail to enjoin the tribal court from asserting jurisdiction over the alleged "nuclear incident."

A. Abstention by Federal Courts So That Claims May Be Exhausted in Other Forums Is a Narrow Exception to the Virtually Unflagging Duty of Federal Courts to Exercise Their Jurisdiction.

This Court has found that there exists a "virtually unflagging obligation of the federal courts to exercise the jurisdiction given them." *Colorado River Water Conservation District*, 424 U.S. at 817. The Court explained that "[a]bstention from the exercise of federal jurisdiction is the exception, not the rule", *id.* at 813, and referred to abstention as an " 'extraordinary and narrow exception to the duty of a District Court to adjudicate a controversy properly before it.' " *Id.* (quoting *County of Allegheny v. Frank Mashuda Co.*, 360 U.S. 185, 188-189 (1959)). As explained in *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 16 (1983), abstention was deemed appropriate in *Colorado River* so as to promote a *federal* purpose – the

> 'clear federal policy . . . [of] avoidance of piecemeal adjudication of water rights in a river system' . . . as evidenced in the McCarran Amendment. We recognized that the Amendment represents Congress' judgment that the

> field of water rights is one peculiarly appropriate for comprehensive treatment in the forums having the greatest experience and expertise, assisted by state administrative officers acting under the state courts.

It is clear that the Petitioners' action properly arises under federal law, 28 U.S.C. § 1331. The district court thus had an obligation to exercise its jurisdiction unless an exception to the virtually flagging obligation of the federal court to exercise its jurisdiction existed, and the Ninth Circuit was wrong in finding otherwise.

B. Exhaustion in Tribal Courts Is Not Required With Respect to Issues Over Which the Tribe Lacks Authority or Where Exhaustion Would Serve No Purpose Other Than Delay.

This Court has developed a tribal exhaustion doctrine with origins both in Indian law and in general abstention doctrine (i.e., that part of the doctrine parallel to the abstention doctrine regarding states). Thus, for example, *National Farmers Union*, 471 U.S. at 856 n.21, quoted *Judice v. Vale*, 430 U.S. 327, 338 (1977), an abstention case, at a critical juncture, and *Iowa Mutual Insurance Co. v. LaPlante*, 480 U.S. 9, 16 n.8 (1987), invoked the principles of *Colorado River*, in stating that exhaustion would be required only "as a matter of comity, not as a jurisdictional prerequisite."

The essential tribal court exhaustion rule is that, unless strong federal policies indicate otherwise, *see Iowa Mutual Insurance Co.*, 480 U.S. at 16 n.8, or unless it can be said that tribal jurisdiction over non-Indians "in a case of this kind" is precluded, *see National Farmers Union*, 471

U.S. at 855, exhaustion may be required; the exceptions to such a requirement include that the exercise of tribal jurisdiction is motivated by bad faith, the action is "patently violative of express jurisdictional prohibitions," or when exhaustion would be futile because of the lack of a subsequent opportunity to challenge the court's jurisdiction. *Id.* at 856 n.21. The issue now before this Court is whether the exercise of tribal jurisdiction in this case is precluded because it is "patently violative of express jurisdictional prohibitions." *Id.*

Strate v. A-1 Contractors answers that question. *Strate*, 520 U.S. at 459, found that an Indian tribe had no legislative or regulatory jurisdiction over a "commonplace state highway accident" on a North Dakota highway through a reservation. Accordingly, the tribe lacked "adjudicative jurisdiction." *Id.* at 453. *Strate* pointedly added that when similar cases arose, they were to be adjudicated in federal, and not tribal court, and that the exhaustion requirements had to give way. *Strate*, 520 U.S. at 459 n.14 (citations omitted) (emphasis added) found:

> When, as in this case, it is plain that no federal grant provides for federal governance of nonmembers' conduct on land covered by *Montana's* main rule, it will be equally evident that tribal courts lack adjudicatory authority over disputes arising from such conduct. As in criminal proceedings, state or federal courts will be the only forums competent to adjudicate those disputes. Therefore, when tribal-court jurisdiction over an action *such as this one* is challenged in federal court, the otherwise applicable exhaustion requirement must give way, for it would serve no purpose other than delay.

Strate makes it clear, therefore, that the term "express jurisdictional prohibition" is to be construed to include any instance in which the tribal court is prevented, as a matter of federal common or federal statutory law, from exercising jurisdiction.[2] *Strate* pointedly did *not* require a specific statement by Congress which preempted tribal jurisdiction. *See also* PA 23a (Kleinfield, J., dissenting).

Strate is thus consistent with *National Farmers Union*, 471 U.S. at 853 (quoting *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 204 (1978)), which noted that " 'Congress never expressly forbade Indian tribes to impose criminal penalties on non-Indians,' " but nonetheless found that the tribe lacked criminal jurisdiction to try and punish non-Indians. *National Farmers Union*, 471 U.S. at 854,

---

[2] The *Strate* footnote also clarifies that when an incident arises on "land covered by *Montana*'s main rule" (not argued to be the case here) and when "no federal grant provides for federal governance of nonmembers' conduct," federal courts will have jurisdiction to determine any dispute over the existence of tribal authority. *Strate*, 520 U.S. at 459 n.14. The literal language of the footnote leaves no other alternative. Moreover, footnote 14 indicates, and the court of appeals seems to acknowledge, *see* PA 7a, 25a, that "while the presumptive absence of tribal jurisdiction can be rebutted by application of one or both of the exceptions identified in *Montana*, *Strate* indicates this determination should be made by the federal court in the context of determining the nonmember's challenge to tribal court jurisdiction." Wrend and Smith, *American Indian Law Deskbook* 138 (2d ed. 1998). Recognizing the authority of the federal courts in this respect makes practical sense, since the principal expertise of tribal courts lies in applying *tribal* law. *Id.* *See also Moses H. Cone*, 460 U.S. at 16 (deference to state court when it had "greatest experience and expertise").

concluded that requiring exhaustion with regard to a tribal attempt to exercise such criminal jurisdiction "would be completely foreclosed. . . .." There is, in short, no necessity for any special language to preclude the necessity for exhaustion, as both *National Farmers Union* and *Strate* confirm.

C. The Price-Anderson Act Deprives the Tribes of Authority Over "Nuclear Incidents"; Exhaustion in Tribal Courts In "Nuclear Incident" Cases Should, Therefore, Not Be Required.

1. The Price-Anderson Act Applies to Indian Tribes.

In *Federal Power Commission v. Tuscarora Indian Nation*, 362 U.S. 99, 116 (1960), this Court stated, "it is now well settled by many decisions of this Court that a general statute in terms applying to all persons includes Indians and their property interests." The Court also emphasized that view later in the opinion, stating that the "general Acts of Congress apply to Indians as well as to others in the absence of a clear expression to the contrary." *Id.* at 120. That principle should control here. The Price-Anderson Act is an act of general application, and under the language of *Tuscarora* applies to Indian litigants and to tribal courts.

Nor can it be argued that *Tuscarora* does not apply because a specific treaty right of a tribal member has been invaded, as was the issue in *United States v. Dion*, 476 U.S. 734 (1986) (Congress found to abrogate specific treaty right after clear showing that the right had been considered by Congress). Accordingly, this case is in line with

those in which the courts have imposed laws of general applicability on tribes and members of tribes in the face of a claim of a generalized treaty right to be free from federal control. *See Smart v. State Farm Ins. Co.*, 868 F.2d 929, 935 (7th Cir. 1989) (quoting F. Cohen, *Handbook of Federal Indian Law* 399 (1982 ed.): " 'There can be little doubt that tribes are subject to [the withholding statute's] requirements as employers, and Indians are covered as employers or employees. . . . Tribes and Indians have in fact complied with this law, and there seems no controversy over it' "); *U.S. Department of Labor v. Occupational Safety & Health Review Commission*, 935 F.2d 182, 186 (9th Cir. 1991) (right of exclusion arising from general treaty language did not preclude the application of the Occupational Safety and Health Administration Act to a sawmill owned and operated by a tribe); *United States v. Baker*, 63 F.3d 1478, 1485 (9th Cir. 1995) (Contraband Cigarette Trafficking Act applied to Indians on reservations despite treaty language).

2. The Price-Anderson Act Precludes the Exercise of Tribal Jurisdiction Over a Nuclear Incident and a Requirement of Exhaustion in Such a Case Is Thus Erroneous.

a. The Tribal Court Lacked Jurisdiction to Consider a Claim Under Tribal Law for Damages Arising From a "Nuclear Incident."

The district court specifically allowed the tribal court to consider whether it had jurisdiction to pursue a claim arising from a "nuclear incident" under *tribal law*, and the court of appeals affirmed. This determination, however, was erroneous.

First, the Price-Anderson Act itself does not allow the existence of tribal cause of action arising from a "nuclear incident." The 1988 Amendments to the Act provide, inter alia, that a "nuclear incident" is any occurrence causing injury or damage "resulting from the radioactive, toxic, explosive, or other hazardous properties" of nuclear materials, 42 U.S.C. § 2014(q), and that "public liability" means "any legal liability arising out of or resulting from a nuclear incident" (with certain exceptions not relevant here). *Id.* at 2014(w). The Amendment in turn defines a "public liability action" to mean "any suit asserting public liability," *id.* at 2014(hh), and provides that a "public liability action shall be deemed to be an action arising under section 2210 of this title." *Id.*

As the court of appeals found, the 1988 Amendments to Price-Anderson expanded its reach to include all " 'public liability actions.' " PA 11a. The court of appeals, at *id.*, also appropriately quoted the language of S. Rep. No. 218, 100th Cong., 1st Sess. 2, 13 (1987), that " '[a]ny suit asserting public liability shall be deemed to be an action under the Price-Anderson Act.' " Likewise, in the case entitled *In re TMI Litigation Cases Consolidated II*, 940 F.2d 832, 854 (3d Cir. 1991), the Court of Appeals for the Third Circuit stated that "A claim growing out of any nuclear incident is compensable under the terms of the [1988] Amendments Act or *it is not compensable at all.*"

Thus, there is no room for a tribal cause of action in the federal arrangement. This point is emphasized by other language of the Act. 42 U.S.C. § 2014(hh) states that:

> A public liability action shall be deemed to be an action arising under section 2210 of this title, and the substantive rules for decision in such

> action shall be derived from the law of the State in which the nuclear incident involved occurs, unless such law is inconsistent with the provisions of such section.

The Act makes *state* substantive law generally applicable in a Price-Anderson Act case. It would be incongruous to allow a *tribal* cause of action to proceed in the face of this language.

Moreover, the Act provides that a "nuclear incident" action filed in *state* court can be removed to federal court. 42 U.S.C. § 2210(n)(2).[3] Again, it would be unreasonable to argue that Congress intended that tribal causes of action (which are *not* removable to federal court) survive, when state causes of action arising from "nuclear incidents" survive but *are* easily removable to federal court. This is especially so considering the aim of Congress to "effect uniformity, equity and efficiency in the disposition" of nuclear-related claims. *In re TMI Litigation Cases II*, 940 F.2d at 857. *Contrast, Moses H. Cone*, 460 U.S. at 16 (abstention in water adjudication *promoted* Congressional policy).

Because Price-Anderson is an Act of general applicability and is applicable to tribes and Indian litigants, and because the Act precludes any cause of action other than those under the Price-Anderson Act, no tribal cause of action could survive. Under *Strate*, 520 U.S. at 459 n.14, exhaustion cannot be required where the tribe lacks regulatory (and thus necessarily adjudicative) authority in actions "such as this one." Thus, the court of appeals

---

[3] This provision, it is clear, allows a *state* court to hear a Price-Anderson Act case, as long as it is not removed.

erred in imposing an exhaustion requirement with regard to the tribal cause of action.

b. The Tribal Court Had No Jurisdiction to Hear an Action Arising Under the Price-Anderson Act.

The district court enjoined the tribal plaintiffs "from pursuing a Price-Anderson Act complaint in tribal court." PA 28a. *See also* PA 30a, 32a-33a. The plaintiffs did not appeal the injunction. The court of appeals, however, announced that it would, based upon "comity" concerns, *id.* at 9a, *sua sponte* examine whether Price-Anderson constitutes an express prohibition of tribal court jurisdiction.

The court of appeals lacked jurisdiction to hear the appeal. Justice Brandeis explained in *United States v. American Railway Express Co.*, 265 U.S. 425, 435 (1924), that

> a party who does not appeal from a final decree of the trial court cannot be heard in opposition thereto when the case is brought here by the appeal of the adverse party. In other words, the appellee may not attack the decree of the view either to enlarging his own rights thereunder or of lessening the rights of his adversary, whether what he seeks to correct is an error or to supplement the decree with respect to a matter not dealt with below.

20 James Wm. Moore, et al., *Moore's Federal Practice* § 304.11[3][b] (3d ed. 1998) summarizes the rule as follows: "if the matters an appellee raises constitute a challenge to the order or judgment, a cross-appeal must be taken." This is distinguished from the situation in which an appellee without cross-appealing simply supports a

decree by utilizing matter in the record, even if the argument involves an attack on the reasoning of the lower court. *American Railway*, 265 U.S. at 435.

Clearly, the failure to take an appeal with regard to the injunction restraining the tribal plaintiffs from proceeding with a Price-Anderson case in tribal court required a separate cross-appeal under established law. Respondents offer no real argument to the contrary. None of the cases cited by Respondents, in fact, would require vacation of an unappealed final order of a district court. Moreover, principles of comity and federalism do not justify the exercise of jurisdiction here, and there is no case authority for formulating a new principle of appellate jurisdiction for the benefit of the Respondents here. Surely no principle of Indian law excuses the Respondents from adherence to the rules of civil procedure. *See generally United States v. Mottaz*, 476 U.S. 834, 851 (1986) (statute of limitations in Quiet Title Act applies to Indians); *Sisseton-Wahpeton Sioux Tribe v. United States*, 895 F.2d 588, 592 (9th Cir. 1990), *cert. denied*, 498 U.S. 824 (1990). Since the filing of a notice of appeal within time limits is " 'mandatory and jurisdictional,' " *Browder v. Director, Department of Corrections*, 434 U.S. 257, 264 (1978), the appeal was improperly heard by the court of appeals.

If this Court does reach the issue of whether the tribal court could properly entertain a case under the Price-Anderson Act, the answer is that it may not. The reason is plain: tribal courts have inherent authority only to apply tribal law.

First, there is no historical, doctrinal, or other basis from which to imply a pre-constitutional power of the

tribes to enforce federal law, which, after all, did not even exist prior to the Constitution. Next, no argument can be made that the Constitution somehow vested in the tribes an inherent power to enforce federal law. The Indian Commerce Clause, U.S. Const., Art. I, § 8, cl. 3, grants *Congress* broad powers over Indian affairs, *see, e.g., McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 172 n.7 (1973), and there is no basis to read the clause as a grant of federal power *to the tribes*. *See also Seminole Tribe v. Florida*, 517 U.S. 44 (1996).

Moreover, it is well established that the inherent authority of the tribes has been *limited*, not expanded, and that tribes may today exercise only those inherent powers that are not inconsistent with their "dependent status." *See, e.g., Montana v. United States*, 450 U.S. 544, 564 (1981). *See also Strate*, 520 U.S. at 457-459. It is surely "inconsistent" with the "dependent status" of Indian tribes to allow them, based on their inherent powers, to enforce provisions of law enacted by the federal government, the entity which exercises plenary power over them.

We likewise do not understand any argument to be made that Congress has in fact legitimately delegated power to the tribes to enforce federal law, in general, or to enforce federal laws dealing with "nuclear incidents" in particular. *See generally Duro v. Reina*, 495 U.S. 676, 693-94 (1990).[4] In short, we do not perceive any doctrinal

---

[4] From another perspective, it is submitted that because, as established above, the federal government has preempted all aspects of nuclear safety under the Price-Anderson Act, tribes may not regulate nuclear safety. Because *Strate*, 520 U.S. at 453,

basis on which to argue that the tribes have ever had or now retain the inherent power to enforce federal law, or any basis on which to argue that such power has been delegated here.

Finally, because the tribes lack authority to enforce federal law, *Strate* precluded the court of appeals from requiring exhaustion of any tribal court remedies in this regard, even if the issue had been properly before it.

CONCLUSION

For the foregoing reasons, the decision below should be reversed.

Respectfully submitted,

MARK W. BARNETT
Attorney General
State of South Dakota

JOHN PATRICK GUHIN
Deputy Attorney General
500 East Capitol Avenue
Pierre, South Dakota 57501-5070
Telephone: (605) 773-3215
Counsel of Record

---

holds, at least in the case of nonmembers, that "a tribe's adjudicative jurisdiction does not exceed its legislative jurisdiction," tribes must also lack the jurisdiction to adjudicate the present dispute under the Price-Anderson Act.

Supreme Court, U.S.
FILED
DEC 7 1998
CLERK

No. 98-6 (7)

In The

Supreme Court of the United States

October Term, 1998

El Paso Natural Gas Company, a Delaware Corporation; Cyprus Foote Mineral Company, a Pennsylvania Corporation and Cyprus Amex Minerals Company, a Delaware Corporation,

Petitioners,

vs.

Laura Neztsosie; Arline Neztsosie; and Zonnie Marie Dandy Richards, Individually and as Representatives of the Estate of Harold J. Richards, Sr.,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

BRIEF OF *AMICUS CURIAE* AMERICAN NUCLEAR INSURERS ("ANI") SUPPORTING NEITHER PARTY AND SUGGESTING REVERSAL

DONALD E. JOSE
Counsel of Record
DAVID WIEDIS
JOSE & WIEDIS
Goshen Executive Center
1450 East Boot Road
Suite 300B
West Chester, PA 19380
(610) 436-1888
Attorneys for Amicus Curiae American Nuclear Insurers

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

38 pp

TABLE OF CONTENTS

Page

Table of Authorities iii

Statement of Interest 1

Summary of The Argument 3

Argument 4

I. Introduction 4

II. *El Paso Natural Gas* is a Price-Anderson Case 4

A. The Applicability of Price-Anderson Depends on the Type of Radioactive Material Alleged to Have Caused Plaintiffs' Damages 4

B. A Nuclear Incident Is Not Limited to a Contract Location Included In an Indemnity Agreement 7

1. Congress Intended Price-Anderson to Cover More Than Just Defendants Who Had Entered an Indemnity Agreement... 7

2. *Gilberg's* Statutory Interpretation of the term "Occurrence" Is Erroneous 10

III. The Price-Anderson Statutory System 13

A. Price-Anderson Background..... 13

B. The 1988 Amendments Act..... 15

C. With the 1988 Amendments Act Congress Limited *Silkwood*..... 20

D. Tribal Courts Should be Treated Like State Courts 21

TABLE OF CONTENTS – Continued

Page

IV. Application of the Price-Anderson Statutory System to This Case 22

A. All Tribal Law Causes of Action Are Extinguished 22

B. The Tribal Court Has Jurisdiction Over a PLA and Must Apply Rules of Decision that are Consistent with the Federal Preemption of Nuclear Safety 22

C. The Standard of Care Must be the Applicable Federal Dose Limits or the NCRP and ICRP Recommendations from Which They Were Taken 23

D. Congress Allows Strict Liability in a PLA Only When the NRC or DOE Declares an ENO 29

IV. Conclusion 30

TABLE OF AUTHORITIES

Page

CASES

Akins v. Sacramento Mun. Util. Dist., 8 Cal. Rptr. 2d 785 (1992), *rev. dismissed*, 868 P.2d 905 (1994) 26

Bohrmann v. Maine Yankee Atomic Power Co., 926 F. Supp. 211 (D. Me. 1996) 16, 24, 26

Cipollone v. Liggett Group, Inc., 505 U.S. 504 (1992) 15

Coley v. Commonwealth Edison Co., 768 F. Supp. 625 (N.D. Ill. 1991) 24

Corcoran v. New York Power Auth., 935 F. Supp. 376 (S.D.N.Y. 1996) 24, 26, 28

Duke Power Co. v. Carolina Envt'l Study Group, Inc., 438 U.S. 59 (1978) 14

El Paso Natural Gas Co. v. Neztsosie, 136 F.3d 610 (9th Cir. 1998), *cert. granted*, 67 USLW 3024 (U.S. Oct. 13, 1998) (No. 98-6) 4, 22

Gilberg v. Stepan Co., 1998 WL 565978 (D.N.J. Aug. 20, 1998) 10, 11, 12, 13

Goodyear Atomic Corp. v. Miller, 486 U.S. 174 (1988) 19

Hennessy v. Commonwealth Edison Co., 764 F. Supp. 495 (N.D. Ill. 1991) 24

In re TMI Litig. Cases Consolidated II ("*In re TMI*"), 940 F.2d 832 (3d Cir. 1991), *cert. denied*, 503 U.S. 906 (1992) ..... *passim*

In re TMI, 67 F.3d 1103 (3d Cir. 1995), *cert. denied*, 516 U.S. 1154 (1996) ..... *passim*

TABLE OF AUTHORITIES – Continued

Page

In re TMI, 67 F.3d 1119 (3d Cir. 1995).... 17, 18, 20, 21

Johnston v. United States, 597 F. Supp. 374 (D. Kan. 1984).....27, 28

Kerr-McGee Corp. v. Farley, 115 F.3d 1498 (10th Cir. 1997), *cert. denied*, 118 S. Ct. 880 (1998) 8

McLandrich v. Southern California Edison Co., 942 F. Supp. 457 (S.D. Cal. 1996) 24, 26

Medtronic Inc. v. Lohr, 518 U.S. 470 (1996) 15

Nieman v. NLO, Inc., 108 F.3d 1546 (6th Cir. 1997).....6, 16, 17, 18, 19

Northern States Power Co. v. Minnesota, 447 F.2d 1143 (8th Cir. 1971), *aff'd*, 405 U.S. 1035 (1972) 13

O'Conner v. Commonwealth Edison Co., 748 F. Supp. 672 (C.D. Ill. 1990), *aff'd*, 13 F.3d 1090 (7th Cir.), *cert. denied*, 512 U.S. 1222 (1994)... 18, 19, 24, 27, 28, 29

O'Conner v. Commonwealth Edison Co., 770 F. Supp. 448 (C.D. Ill. 1991), *aff'd*, 13 F.3d 1090 (7th Cir.), *cert. denied*, 512 U.S. 1222 (1994) 19

O'Conner v. Commonwealth Edison Co., 807 F. Supp. 1376 (C.D. Ill. 1992), *aff'd*, 13 F.3d 1090 (7th Cir.), *cert. denied*, 512 U.S. 1222 (1994) 28

O'Conner v. Commonwealth Edison Co., 13 F.3d 1090 (7th Cir.), *cert. denied*, 512 U.S. 1222 (1994).... *passim*

Pacific Gas and Electric Co. v. State Energy Resources Conservation & Devel. Comm'n, 461 U.S. 190 (1983) 13, 14, 23, 25

TABLE OF AUTHORITIES – Continued

Page

Retail Clerks v. Schermerhorn, 375 U.S. 96 (1963)..... 15

Roberts v. Florida Power and Light Co., 146 F.3d 1305 (11th Cir. 1998), *petition for cert. filed*, 67 USLW 3285 (U.S. Oct. 16, 1998) (No. 98-640)... 5, 16, 24, 25

Silkwood v. Kerr-McGee Corp., 485 F. Supp. 566 (W.D. Okla. 1979), *aff'd in part and rev'd in part on other grounds*, 667 F.2d 908 (10th Cir. 1981), *rev'd*, 464 U.S. 238 (1984) 21

Silkwood v. Kerr-McGee, 464 U.S. 238 (1984) 13, 20, 21, 23, 25, 28

Smith v. General Elec. Co., 938 F. Supp. 70 (D. Mass. 1996).....24, 26

Whiting v. Boston Edison Co., 891 F. Supp. 12 (D. Mass. 1995) 24

STATUTES

42 U.S.C. § 2012..... 15

42 U.S.C. § 2012(e) 7

42 U.S.C. § 2012(i)..... 17

42 U.S.C. § 2014(e) 6, 10, 14

42 U.S.C. § 2014(j)..... 11

42 U.S.C. § 2014(q) 5, 11, 12

42 U.S.C. § 2014(t)..... 21

42 U.S.C. § 2014(w)..... 5

42 U.S.C. § 2014(z) 6, 10, 14

42 U.S.C. § 2014(aa) 10, 14

TABLE OF AUTHORITIES – Continued

Page

42 U.S.C. § 2014(hh) 5, 15, 17, 22, 23

42 U.S.C. §§ 2061-64 14

42 U.S.C. §§ 2071-78 14

42 U.S.C. §§ 2091-99 14

42 U.S.C. §§ 2111-2114 14

42 U.S.C. § 2210 ..... 14, 17, 18

42 U.S.C. § 2210(a) 17

42 U.S.C. § 2210(b)(1) 1

42 U.S.C. § 2210(n)(1) 29

42 U.S.C. § 2210(n)(2) 16, 22

42 U.S.C. §§ 2211-2281 14

OTHER AUTHORITIES

10 C.F.R. § 20.101 19

10 C.F.R. § 140.83 11

10 C.F.R. § 140.84(a) 11

10 C.F.R. § 140.85(a) 11

10 C.F.R. § 140.85(a)(1) 11

56 Fed. Reg. 57824 (1991) 13

62 Fed. Reg. 68272 (1997) 9

133 Cong. Rec. H6,815 (daily ed. July 30, 1987) 17

TABLE OF AUTHORITIES – Continued

Page

141 Cong. Rec. S10,185-01 (daily ed. July 18, 1995) ..6, 16

H.R. Rep. No. 2181, 83d Cong., 2d Sess. (1954) 13

H.R. Rep. No. 104, 100th Cong., 1st Sess., pt. 1 (1987) 8, 17

S. Rep. No. 296, 85th Cong., 1st Sess., *reprinted in* 1957 U.S. Code Cong. & Admin. News 1803 ..... 9, 17

S. Rep. No. 1677, 87th Cong., 2d Sess., *reprinted in* 1962 U.S. Code Cong. & Admin. News 2207 9

AMERICAN CANCER SOCIETY, CANCER FACTS & FIGURES (1997) 2

United States Nuclear Regulatory Commission, *The Price-Anderson Act – Crossing the Bridge to the Next Century: A Report to Congress* (August 1998) 21

STATEMENT OF INTEREST[1]

In the Price-Anderson Act, Congress originally limited liability from nuclear accidents to $560 million per accident funded in three layers. Today, that limit is over $9 billion. Congress directed that the first layer of financial protection should be handled by the private insurance industry. 42 U.S.C. § 2210(b)(1). American Nuclear Insurers ("ANI") is a voluntary, nonprofit pool of insurance companies who provide up to $200 million in private primary layer liability insurance to those licensees required to comply with Price-Anderson financial protection requirements. If claims exhaust this level of insurance, ANI also administers the secondary layer by collecting retrospective premiums (approximately $80 million per reactor) from nuclear reactor operators. *Id.* Today, the primary and secondary layers provide over $9 billion of total privately financed financial security for the nuclear risk. Originally there was a third layer of NRC indemnity up to a limit of $560,000,000 per accident when there were fewer reactors and less private primary insurance, but today the first two layers are completely sufficient to fully fund the total limit of liability. If claims exceed $9 billion, Congress will address the issue. Thus, ANI effectively administers the full Price-Anderson financial protection system from private insurance and retroactive premiums of over $9 billion.

---

[1] The parties have consented to the filing of this brief. Counsel for a party did not author this brief in whole or in part. No person or entity, other than the *Amicus Curiae*, its members, or its counsel made a monetary contribution to the preparation and submission of this brief.

ANI insures nuclear reactor facilities, suppliers and transporters. Less than half the policies ANI issues are to commercial nuclear power plants, most are issued to other businesses participating in the overall nuclear industry. ANI does not insure DOE facilities, contractors operating under a DOE contract, uranium mining or milling and conversion of uranium ore to uranium hexafloride. Primary layer coverage for these facilities is provided by DOE indemnity agreements and by conventional insurance. Most Price-Anderson cases which have been litigated have involved ANI's insureds. Since ANI is charged with effectively administering both the first and second level of claims payments for most participants in the nuclear industry, ANI is vitally interested in a body of law which effectuates the Congressional purpose to keep the nuclear industry insurable, and which serves to make the Price-Anderson system workable. The practical and experienced voice of ANI should be heard as how this Act should operate in order to keep this industry insurable as Congress desired.

One of the consequences of a high dose of radiation to a worker or to a member of the general public can be the development of a cancer years later. The American Cancer Society estimates that the natural incidence of cancer in the United States is about 50% for men and about 33% for women. AMERICAN CANCER SOCIETY, CANCER FACTS & FIGURES 1 (1997). It is likely that many people who worked in nuclear facilities or lived nearby will develop one of these natural incidence cancers at some time in their lives and will have concerns as to whether their cancer was caused by occupational or environmental radiation. Any radiation induced cancers resulting from the nuclear hazard will have to be identified from the

large natural incidence of cancer before compensation can be provided. If the law interpreting Price-Anderson were to result in compensation for any cancer, including those naturally occurring cancers, the nuclear industry would become uninsurable and the Congressional purpose would be defeated. In the 41 years that Price-Anderson has existed, the primary layer of private insurance has covered all claims against insureds of ANI. Consequently, the private insurance industry has been sufficient to insure the public interest in keeping the nuclear option open. ANI, as the administrative body through which those companies work, has fulfilled the public interest in providing that approximately 20 percent of U.S. electrical energy is provided by nuclear plants. Thus, the work of ANI was initiated at the direction of Congress, vested with the public interest, and is essential in effectuating the policies of the Atomic Energy Act of which Price-Anderson is a part. No other entity has developed such a comprehensive understanding of how the Act should work to accomplish its purposes.

SUMMARY OF THE ARGUMENT

To effectuate nuclear safety, Congress has developed a comprehensive statutory system through the Atomic Energy Act, of which the Price-Anderson Act is a part. In 1988, Congress extinguished all prior existing state causes of action and replaced them with one cause of action, the public liability action ("PLA"). Given Congress' intent to protect all Americans from the harmful effects of specified radioactive materials and to provide an exclusive federal remedy if such harm occurred, it would be incongruous to carve out an exception to Price-Anderson

coverage merely because the exposure to radioactive materials occurred on an Indian reservation under tribal court jurisdiction. It would be fundamentally unfair to deny Indians the financial protection available under Price-Anderson. It cannot reasonably be argued that if a cloud of radioactive materials was released on the west coast and drifted across the United States, Congress intended for the Act's financial protection to disappear during the times that cloud passed over Indian reservations and to reappear again as soon as the cloud left Indian land. Thus, tribal courts should be treated the same as state courts under the terms of the Act.

ARGUMENT

I. Introduction.

The issues presented are whether the Price-Anderson Act ("PAA" or the "Act") applies to claims arising from radiation generated by uranium mining operations when there was no contract of indemnity with the Atomic Energy Commission ("AEC") (predecessor to the Nuclear Regulatory Commission ("NRC") or the Department of Energy ("DOE")) and, if so, whether such a PAA case should be litigated in tribal court.

II. *El Paso Natural Gas* is a Price-Anderson Case.

A. The Applicability of Price-Anderson Depends on the Type of Radioactive Material Alleged to Have Caused Plaintiffs' Damages.

In the 1988 Price-Anderson Amendments Act (the "Amendments Act"), Congress extinguished all state law

causes of action and replaced them with a federal cause of action whenever a claimant alleges harm from certain radioactive materials specified in the Act. Congress broadly defined "public liability action" ("PLA") to mean "***any*** suit asserting public liability," 42 U.S.C. § 2014(hh), and defined "public liability" to mean" ***any legal liability*** arising out of or resulting from a nuclear incident . . . . " 42 U.S.C. § 2014(w) (emphasis added). Congress broadly defined "nuclear incident" to mean:

> ***any*** occurrence . . . ***within the United States*** causing . . . ***bodily injury,*** sickness, disease, or death, or ***loss of or damage to property,*** or loss of use of property, arising out of or resulting from the ***radioactive,*** toxic, explosive, or other hazardous properties of ***source, special nuclear, or byproduct material.***

42 U.S.C. § 2014(q) (emphasis added).

By defining public liability so broadly as to include "***any*** legal liability," Congress preempted and extinguished all state law causes of action for damages arising from those nuclear materials. *In re TMI Litig. Cases Consolidated II ("In re TMI")*, 940 F.2d 832, 854 (3d Cir. 1991), *cert. denied*, 503 U.S. 906 (1992). The Third, Sixth, Seventh, and Eleventh Circuits have held:

> after the Amendments Act, ***no state cause of action based upon public liability exists.*** A claim growing out of any nuclear incident is compensable under the terms of the Amendments Act or ***it is not compensable at all.***

Id. (emphasis added); *Roberts v. Florida Power and Light Co.*, 146 F.3d 1305, 1306 (11th Cir. 1998) ("The Amendments Act created an exclusive federal cause of action for radiation injury."), *petition for cert. filed*, 67 USLW 3285

(U.S. Oct. 16, 1998) (No. 98-640); *Nieman v. NLO, Inc.*, 108 F.3d 1546, 1553 (6th Cir. 1997) ("state law claims cannot stand as separate causes of action. [Plaintiff] can sue under the Price-Anderson Act as amended or not at all."); *O'Conner v. Commonwealth Edison Co.*, 13 F.3d 1090, 1099-1100 (7th Cir.), *cert. denied*, 512 U.S. 1222 (1994) ("a new federal cause of action supplants the prior state cause of action."); *see also* 141 Cong. Rec. S10,185-01, S10,185-86 (daily ed. July 18, 1995).

By defining nuclear incident so broadly, Congress intended to condition whether an action is a PLA on whether a plaintiff alleges bodily harm or property damage from ***"source, special nuclear, or byproduct material."*** "Source material" is:

> (1) ***uranium***, thorium, or any other material which is determined by the Commission pursuant to the provisions of section 2091 of this title to be source material; or (2) ***ores containing one or more of the foregoing materials***, in such concentration as the Commission may by regulation determine from time to time.

42 U.S.C. § 2014(z) (emphasis added). "Byproduct material" is:

> (1) any radioactive material (except special nuclear material) yielded in or made radioactive by exposure to the radiation incident to the process of producing or utilizing special nuclear material, and (2) ***the tailings or wastes produced by the extraction or concentration of uranium or thorium from any ore processed primarily for its source material content.***

42 U.S.C. § 2014(e) (emphasis added). Uranium mining and claims arising from such operations were specifically incorporated into Price-Anderson by Congress as "source

material." *Id.*; 42 U.S.C. § 2012(e). ("Source . . . material . . . are affected with the public interest. . . . "). Respondents allege bodily injury arising from source and byproduct material. Thus, Respondents' sole cause of action arising from exposure to source and byproduct material from Petitioners' mining operation must be litigated as a Price-Anderson case.

B. A Nuclear Incident Is Not Limited to a Contract Location Included In an Indemnity Agreement.

1. Congress Intended Price-Anderson to Cover More Than Just Defendants Who Had Entered an Indemnity Agreement.

Price-Anderson has developed over fifty years and must be viewed:

> in ***the context of the entire federal statutory scheme*** on nuclear power. The Amendments Act is simply the ***last addition*** to the federal law of nuclear energy ***that has been evolving*** since 1946 when Congress enacted the Atomic Energy Act. . . . Thus, the Amendments Act is the ***latest installment in nearly fifty years of congressional work***. During that time . . . Congress has balanced this encouragement of private sector activity with an acute concern for public safety by authorizing extensive regulation first by the Atomic Energy Commission, and now by the Nuclear Regulatory Commission, and by imposing a carefully constructed measure of liability should nuclear accidents occur.

O'Conner, 13 F.3d at 1095-97 (emphasis added). Congress' concerns for nuclear safety extend far beyond the site boundaries of an entity that has entered into an indemnity agreement.

In enacting the 1988 Amendments Act, Congress explained the broad coverage of the PAA:

> The financial protection arrangements, indemnities, and liability limitations cover ***any person who may be liable for damages from a nuclear accident,*** **not just the licensee or the contractor . . .**
>
> Currently there are 109 large commercial power plants and approximately 50 university research reactors, 7 Federal agency reactors, 16 non-power reactors, and 5 small power reactors licensed by the NRC and covered by Price-Anderson protection. In addition, there are over 100 DOE contracts containing Price-Anderson protection. ***They cover approximately 50 prime contractors and 70,000 subcontractors and lower-tier suppliers.***

H.R. Rep. No. 104, 100th Cong., 1st Sess., pt. 1, at 5 (1987) (emphasis added).

The Tenth Circuit recognized this broad coverage:

> From this framework, it is apparent that Congress intended to expand federal control over safety and liability issues involving the nuclear industry, particularly with respect to the role of federal courts in resolving liability. . . . [The Act's] provisions [are] broad enough to create a federal forum for ***any tort*** claim ***even remotely*** involving atomic energy production. The PAA ***on its face*** provides the sole remedy for the torts alleged . . . .

Kerr-McGee Corp. v. Farley, 115 F.3d 1498, 1504 (10th Cir. 1997), *cert. denied,* 118 S. Ct. 880 (1998) (emphasis added). Likewise, the DOE Office of General Counsel officially interprets Price-Anderson as covering:

> all "persons indemnified" under the Act. The term "person" is ***broadly defined to include every possible individual or entity*** except the [NRC] or DOE . . . The term "person indemnified" is defined as the person with whom any indemnity agreement is executed," e.g., a DOE contractor, ***"and any other person*** who may be liable for public liability" for a nuclear incident. This provision extends the protection of the DOE Price-Anderson indemnification to ***any person, including those persons who have no legal relationship to DOE or the indemnified contractor,*** who may be liable for a nuclear incident within the United States arising under a DOE contract. Thus, a subcontractor, a supplier, a shipper or ***other third party*** is covered ***even if it is not a party to the indemnity agreement between DOE and the contractor.***

62 Fed. Reg. 68272, at 68274 (1997) (emphasis added). The DOE General Counsel further elaborated:

> The coverage was intentionally ***broad and extended to any person who may be liable for public liability.*** S. Rep. No. 1677, 87th Cong., 2d Sess. (1962), U.S. Code Cong. & Ad. News 2207, 2215-16. In the hearings on the original Act, "the question of protecting the public was raised where some unusual incident, such as negligence in maintaining an airplane motor, should cause an airplane to crash into a reactor and thereby cause damage to the public. Under this bill, the public is protected and the airplane company ***can also take advantage of the indemnification and other proceedings."***

Id. at n.18 (*quoting* S. Rep. No. 296, 85th Cong., 1st Sess., *reprinted in* 1957 U.S. Code Cong. & Admin. News 1803,

1818) (emphasis added). If the manufacturer of an airplane flying over a nuclear plant is covered without an indemnity agreement, then certainly the company that mined the uranium ore for the AEC is covered. Thus, El Paso comes within the definition of "person indemnified," even if it is not a party to an indemnity agreement.[2]

Given Congress' "sweeping" definition of a nuclear incident, and given the exclusive nature of the PLA cause of action, Price-Anderson does not require bodily injury or property damage to occur at any particular location. It only requires that the bodily injury or property damage arise out of exposure to those radioactive materials specifically defined in 42 U.S.C. §§ 2014(e), (z), and (aa).

Any other restrictive definition of a nuclear incident would make recovery under Price-Anderson limited to events occurring only at a facility directly covered by an indemnity agreement, and would leave unprotected members of the public who are injured by radioactive materials that have traveled through many vectors to reach them. This would be contrary to Congress' intent to protect all Americans from the nuclear hazard, wherever and however exposed.

2. *Gilberg's* Statutory Interpretation of the term "Occurrence" Is Erroneous.

The New Jersey District Magistrate's analysis of Price-Anderson in *Gilberg v. Stepan Co.*, 1998 WL 565978

---

[2] Congress did not intend to enable a plaintiff to circumvent the entire Price-Anderson system by suing only a subcontractor or supplier who has not entered into an indemnity agreement.

(D.N.J. Aug. 20, 1998), contradicts the clear language of the Act. In *Gilberg*, the Court held that an indemnity agreement is a prerequisite for a PLA. *Id.* at *6. The magistrate misapplied the definition for the term "offsite" for purposes of an extraordinary nuclear occurrence ("ENO")[3] in subsection 2014(j) as being the definition for the term "occurrence" for purposes of a non-ENO nuclear incident in subsection 2014(q). *Id.* The *Gilberg* Court failed to discern that an ENO is a subtype of an ordinary nuclear incident. 42 U.S.C. § 2014(q). An ENO is "a discharge . . . ***offsite*** [which] . . . has resulted or will probably result in substantial damages to persons ***offsite*** or property ***offsite.***" 42 U.S.C. § 2014(j) (emphasis added). In order to determine whether any release traveled offsite there must be a clear distinction between "onsite" and "offsite" at any facility. The reference to a contract location was not intended to define the term "nuclear incident," but merely to explain how to determine the boundaries of the site for purposes of determining whether the release traveled offsite or remained onsite. Thus, Congress both provided the means to determine the site and indicated that the definition of "offsite" is

---

[3] There are two criteria for the NRC to declare an ENO. 10 C.F.R. § 140.83. Criterion I requires a "substantial" offsite release of nuclear materials. This occurs, *inter-alia*, when the NRC "finds that one or more persons offsite were, could have been, or might be exposed to" a whole body dose of 20 rem (20,000 millirem). *Id.*, at § 140.84(a). Criterion II requires "substantial damages" to persons offsite. *Id.*, at § 140.85(a). In this context, "substantial damages" means, *inter-alia*, that the ENO "has resulted in the death or hospitalization, within 30 days of the event, of five or more people located offsite showing objective clinical evidence of physical injury from exposure to [nuclear material]." *Id.*, at § 140.85(a)(1).

limited to an ENO: "***As used in this subsection*** 'offsite' means away from the 'location' or the 'contract location'. . . . " *Id.* (emphasis added).

Congress defined, ***without qualification as to location***, the term "nuclear incident" as "***any*** occurrence . . . arising out of . . . source, special nuclear, or byproduct material. . . . " 42 U.S.C. § 2014(q) (emphasis added). Congress did not limit the definition of nuclear incident in the same way it limited the definition of "offsite" for the purposes of an ENO. A nuclear incident can occur anywhere and is not limited to a site covered by an indemnity agreement.

Recently, in commenting on a Final Rule revising the Department of Energy Acquisition Regulation ("DEAR") to implement the provisions of the Price-Anderson Act, the DOE directly refuted the *Gilberg* Magistrate's analysis:

> DOE agrees with the comments that an agreement between DOE and a contractor or its subcontractor or supplier ***is not a condition precedent to indemnification under Price-Anderson*** . . . One comment addressed the treatment of DOE clean-up contractors under the Price-Anderson indemnity framework. This comment urged DOE to (1) state explicitly that the Price-Anderson indemnity covered clean-up contractors, (2) extend Price-Anderson indemnity to all liabilities caused by mixed radioactive/hazardous wastes, and (3) coordinate nuclear and non-nuclear indemnification policies to avoid inadvertent gaps in coverage. Price-Anderson indemnity clearly is available to DOE "clean-up contractors." ***DOE finds no reason, however, to list the types of DOE contractors covered by the Price-Anderson indemnity since the coverage results not from the type of contractor but rather from the presence of a risk of public liability from a nuclear incident in the work to be performed under the contract.***

56 Fed. Reg. 57824, at 57825 (1991) (emphasis added). Thus, the *Gilberg* Court's analysis is wrong.

III. The Price-Anderson Statutory System.

A. Price-Anderson Background.

The federal regulation of nuclear power is one of the most comprehensive frameworks of federal regulation ever promulgated. *See Northern States Power Co. v. Minnesota*, 447 F.2d 1143, 1153-54 (8th Cir. 1971), *aff'd*, 405 U.S. 1035 (1972). States are precluded from regulating the safety aspects of nuclear energy. *See Silkwood v. Kerr-McGee*, 464 U.S. 238, 249 (1984) (federal government occupies entire field of nuclear safety); *Pacific Gas and Electric Co. v. State Energy Resources Conservation & Devel. Comm'n*, 461 U.S. 190, 208 (1983) ("the safety of nuclear technology [is] the exclusive business of the Federal Government.").

Although nuclear power was originally a government monopoly, within ten years of passing the Atomic Energy Act ("AEA"), Congress concluded:

> that the national interest would be best served if the Government encouraged the private sector to become involved in the development of atomic energy for peaceful purposes under a program of federal regulation and licensing.

Id. at 207 (*citing* H.R. Rep. No. 2181, 83d Cong., 2d Sess. 1-11 (1954)). Thus, the 1954 AEA ended the federal monopoly and encouraged private sector involvement

under federal licensing regulation. *In re TMI*, 940 F.2d at 852; *see* 42 U.S.C. §§ 2211-2281.

The federal government:

> ***erected a complex scheme*** to promote the civilian development of nuclear energy, while seeking ***to safeguard the public*** and the environment from the unpredictable risks of a new technology.

Pacific Gas, 461 U.S. at 194 (emphasis added). The 1954 AEA provided:

> for licensing of private construction, ownership, and operation of commercial nuclear power reactors for energy production under strict supervision by the Atomic Energy Commission.

Duke Power Co. v. Carolina Envt'l Study Group, Inc., 438 U.S. 59, 63 (1978); *Pacific Gas*, 461 U.S. at 207. The Atomic Energy Commission ("AEC") (the predecessor of the NRC) "was given ***exclusive jurisdiction*** to license the transfer, delivery, receipt, ***acquisition, possession, and use of nuclear materials.***" *Id.* (*citing* 42 U.S.C. §§ 2014(e), (z), (aa), 2061-2064, 2071-2078, 2091-2099, 2111-2114 (1976 ed. and Supp. V)) (emphasis added). "Upon these subjects ***no role was left for the States.***" *Id.* (emphasis added).

As a result of private industry's reluctance to participate in nuclear industry work because of the potential risk of "vast liability," *Duke Power Co.*, 438 U.S. at 64, Congress enacted the Price-Anderson Act of 1957, 42 U.S.C. § 2210, amending the AEA. It has the dual purpose of protecting the public by ensuring a reliable source of

funds for public compensation in the event of a nuclear accident, and encouraging the development of the nuclear energy industry by setting limits on the liability of private industry. *See* 42 U.S.C. § 2012; *In re TMI*, 940 F.2d at 852; *O'Conner*, 13 F.3d at 1096.

B. The 1988 Amendments Act.

Building on preemption of the entire field of nuclear safety,[4] in 1988 Congress passed the Amendments Act which expressly delineated the scope of existing field preemption by creating a new and exclusive federal cause of action, the PLA. The Amendments Act dramatically transformed the Price-Anderson landscape in at least four ways.

First, the Amendments Act expressly created the PLA as the exclusive remedy for all injury or property damage claims arising from a "nuclear incident." 42 U.S.C. § 2014(hh); *In re TMI*, 940 F.2d at 837. Prior to the 1988 Amendments Act, there was no federal cause of action for a non-ENO, and there was no federal subject matter jurisdiction. *In re TMI*, 67 F.3d 1103, 1105 (3d Cir. 1995),

---

[4] The "purpose of Congress is the ultimate touchstone" in preemption. *Medtronic Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (*quoting Retail Clerks v. Schermerhorn*, 375 U.S. 96, 103 (1963)). The scope of preemption must rest primarily " 'on a fair understanding of congressional purpose' " which may be discerned from both the language of the statute and "the way in which Congress intended the statute ***and its surrounding regulatory scheme*** to affect business, consumers, and the law." *Id.* at 486 (*quoting Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 530 n.27 (1992)) (emphasis added).

cert. denied, 516 U.S. 1154 (1996). Accordingly, prior to the Amendments Act, persons claiming injury from radiation, such as the Respondents here, could file state law causes of action in state or federal courts, and could recover under any theory of liability available in the applicable state court. *Id.*; *Bohrmann v. Maine Yankee Atomic Power Co.*, 926 F. Supp. 211, 216-217 (D. Me. 1996). After the Amendments Act however:

> ***no state cause of action based upon public liability exists.*** A claim growing out of any nuclear incident is compensable under the terms of the Amendments Act or ***it is not compensable at all.***

In re TMI, 940 F.2d at 854 (emphasis added). *See also Roberts*, 146 F.3d at 1308; *Nieman*, 108 F.3d at 1553; *O'Connor*, 13 F.3d at 1099-1100; 141 Cong. Rec. S10,185-01, S10,185-86 (daily ed. July 18, 1995).

Second, the Amendments Act guaranteed the defendant a federal forum by providing the United States district courts with original jurisdiction, and by providing for the removal of PLAs to the district court at the defendant's election. 42 U.S.C. § 2210(n)(2).[5] Thus, while state courts retain jurisdiction over the PLA, any defendant has the right to remove to a federal district court pursuant to § 2210(n)(2).

Third, Congress also mandated that the rules for decision in a PLA will be consistent with the NRC, DOE,

---

[5] Section 42 U.S.C. § 2210(n)(2) states:

> With respect to any public liability action arising out of or resulting from a nuclear incident, the United States district court in the district where the incident takes place . . . shall have original jurisdiction.

or AEC regulations through which the federal preemption of nuclear safety is effectuated, by preempting all state law rules for decision that are ***"inconsistent"*** with the Price-Anderson Act.[6] 42 U.S.C. § 2014(hh) (emphasis

---

[6] The exact language, "such section," in § 2014(hh) (referring back to § 2210) is an artifact from the 1988 Amendments Act, which was primarily contained in § 2210. 42 U.S.C. § 2014(hh) (A PLA "shall be deemed to be an action arising under section 2210. . . . "); *O'Conner*, 13 F.3d at 1100. Both the legislative history and well established subsequent case law interpret the phrase "such section" as referring to the entire Price Anderson Act. *See e.g., id.* and *In re TMI*, 940 F.2d at 856 (both citing H.R. Rep. No. 104, 100th Cong., 1st Sess., pt. 1 at 18 ("unless such law is inconsistent with the Price-Anderson Act.")); *In re TMI*, 67 F.3d 1119, 1123 (3d Cir. 1995) (interpreting "such section" as the "Price-Anderson Act"); *Nieman*, 108 F.3d at 1552 (considering whether plaintiff's claim was inconsistent with "the Price-Anderson Act" in section of opinion entitled "Consistency with Price-Anderson Act."); *O'Conner*, 13 F.3d at 1101 ("courts will be required to determine whether state law principles conflict with other parts of the Price-Anderson scheme."). Also, § 2210 itself explicitly and implicitly incorporates and defers to the existing federal regulatory framework. For example, § 2210(a) requires each licensee to carry "financial protection of such type and amounts as the [NRC] . . . in the exercise of its licensing and regulatory authority and responsibility shall require . . . " Thus, in § 2210(a), Congress expressly deferred to the ***NRC's regulatory control over nuclear plants.*** *See also*, S. Rep. No. 296, 85th Cong., 1st Sess., *reprinted in* 1957 U.S. Code Cong. & Admin. News 1803, 1819 (leaving the ***control*** over misconduct to the ***NRC licensing process***); 133 Cong. Rec. H6,815 (daily ed. July 30, 1987) (statement of Mr. Udall reading letter of Secretary of Energy) (excluding penalties from the Act since ***federal regulations will control conduct***). Section 2210(a) requires as a condition of a license, each licensee to have and maintain financial protection "for the public purposes cited in § 2012(i)." In § 2012(i), Congress declared its policy to "protect the health

added); *In re TMI*, 67 F.3d 1119, 1122 (3rd Cir. 1995); *In re TMI*, 940 F.2d at 857; *O'Conner*, 13 F.3d at 1101. After creating the exclusive PLA, Congress did not go on to provide a "complete and self-sufficient body of federal law" to be applied in a PLA, but Congress rarely does so. *In re TMI*, 940 F.2d at 854. The "Price-Anderson system, by design, alters state tort law to forward the goals of that act." *Nieman*, 108 F.3d at 1552 (*quoting O'Conner*, 13 F.3d at 1100). In amending the Act,[7] Congress was well aware that the Price-Anderson compensation system must operate as a consistent part of a larger federal framework governing the safe use of nuclear energy. *O'Conner*, 13 F.3d at 1100 ("Congress recognized that state law would operate in the context of a complex federal scheme which would mold and shape any cause of action grounded in state law."); *id.* at 1105 (Price-Anderson operates within "a stringent regulatory background.").

---

and safety of the public and to encourage the development of the atomic energy industry, in the interest of the general welfare. . . . " This policy is accomplished through the NRC permissible dose limits which provide a licensee with "a clear statement regarding how it may limit a worker's dose ***without exposing the worker to injury or itself to liability.***" *O'Conner v. Commonwealth Edison Co.*, 748 F. Supp. 672, 678 (C.D. Ill. 1990), *aff'd*, 13 F.3d 1090 (7th Cir.), *cert. denied*, 512 U.S. 1222 (1994) (emphasis added). *See also O'Conner*, 13 F.3d at 1103; *In re TMI*, 67 F.3d at 1115. That Congress included and deferred to the work of the NRC in its reference to § 2210 is demonstrated by the fifty-seven times the words "Nuclear Regulatory Commission" or "Commission" are actually used in § 2210.

[7] Approximately every ten years since enacting Price-Anderson Act, Congress has amended it in light of current experience, continually building and refining a comprehensive federal structure to protect both the nuclear industry and the public. *In re TMI*, 940 F.2d at 852-53.

The "federal nuclear safety regulations," including the permissible dose limits established by 10 C.F.R. § 20.101, "are a part of this" larger federal framework. *Id.* Congress is presumed to know "existing law pertinent to the legislation it enacts." *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 184-85 (1988). Congress was not required to repeat in the Amendments Act every regulation or judicial determination that it knew had already been enacted or decided. It knew that "[n]umerous federal questions will necessarily arise in the course of litigation under this Act, which questions must be resolved consistently with the pervasive federal scheme." *O'Conner v. Commonwealth Edison Co.*, 770 F. Supp. 448, 454 (C.D. Ill. 1991), *aff'd*, 13 F.3d 1090 (7th Cir.), *cert. denied*, 512 U.S. 1222 (1994).

By directing federal courts to "derive" (not adopt) federal rules for decision only from state law rules for decision that are consistent with existing federal regulatory and statutory law, Congress delineated the scope of field preemption, and set the entire preexisting federal framework ***it had already erected*** as the polestar by which the federal judiciary should be guided as it establishes this new body of federal law interpreting the PLA. *In re TMI*, 940 F.2d at 854; *O'Conner*, 13 F.3d at 1105; *Nieman*, 108 F.3d at 1552; *O'Conner v. Commonwealth Edison Co.*, 748 F. Supp. 672, 678 (C.D. Ill. 1990), *aff'd*, 13 F.3d 1090 (7th Cir.), *cert. denied*, 512 U.S. 1222 (1994). In *O'Conner*, the Seventh Circuit confirmed that the existing federal framework was the standard by which the consistency of state rules for decision must be measured: "[W]e must look at the Amendments Act ***in the context of the entire federal statutory scheme*** on nuclear power." *O'Conner*, 13 F.3d at 1095-97 (emphasis added).

Through these important changes, the Amendments Act established an efficient, nationally uniform system in which valid claims are quickly compensated and invalid claims are denied. *See generally, id.* at 1100-1101, 1105.

C. With the 1988 Amendments Act Congress Limited *Silkwood*.

This Court's *Silkwood* opinion interpreted Price-Anderson ***as it existed four years prior to the changes made in 1988 Amendments Act.*** This Court held:

> No doubt there is ***tension*** between the conclusion that safety regulation is the exclusive concern of the federal law and the conclusion that a State may nevertheless award damages based on its own law of liability. But . . . ***Congress intended to stand by both concepts and to tolerate whatever tension there was between them.*** We can do no less.

Silkwood, 464 U.S. at 256 (emphasis added). Concurring with the dissents, Congress dramatically transformed the Price-Anderson landscape and resolved that "tension." *See O'Conner*, 13 F.3d at 1105 n.13. ***Congress created the precise federal remedy for persons injured by radiation that the Silkwood majority had found missing.*** The 1988 Amendments Act severely limited the precedential value of *Silkwood*.[8] *See In re TMI*, 940 F.2d at 857-58; *In re TMI*,

---

[8] *Silkwood* is further distinguishable from a PLA case on the following grounds: First, *Silkwood* did not address any issues in a PLA. Second, *Silkwood* discusses remedies not causes of action. Third, *Silkwood* was a diversity action, 464 U.S. at 243, not a Price-Anderson case. *Id.* at 251. Fourth, the federal regulations governing offsite exposure to plutonium were exceeded. *See*

67 F.3d at 1124 (Congress partially limited *Silkwood's* holding in 1988).

D. Tribal Courts Should be Treated Like State Courts.

The PAA does not mention tribal courts in its text or in its legislative history. The NRC has recommended that Congress address this issue when it next amends Price-Anderson: "The commission recommends that Congress should determine whether a public liability lawsuit arising or resulting from a nuclear incident may be filed in a tribal court." United States Nuclear Regulatory Commission, *The Price-Anderson Act – Crossing the Bridge to the Next Century: A Report to Congress*, at 131 (August 1998). Until that time, ANI sees no reason to treat tribal courts as anything less than state courts under the current Act. Congress intended for all persons in the United States to enjoy the financial protection created by this Act. It cannot be reasonably argued that if a cloud of radioactive particles was released on the west coast and drifted across the United States to the east coast, Congress intended for the Act's financial protection to disappear

---

Silkwood v. Kerr-McGee Corp., 485 F. Supp. 566, 583 (W.D. Okla. 1979) (Silkwood's exposure to plutonium in her apartment exceeded by two and a half times the exposure permitted), *aff'd in part and rev'd in part on other grounds*, 667 F.2d 908 (10th Cir. 1981), *rev'd*, 464 U.S. 238 (1984). Fifth, *Silkwood's* dictum that ***compensatory damages*** do not conflict with the federal preemption of nuclear safety is a reference to the measure of compensatory damages for the injury suffered by the plaintiff. Compensatory damages say nothing about a defendant's conduct and are therefore irrelevant to the standard of care. Finally, the *dicta* in footnote 12 fails to realize that "other persons indemnified" includes "any other person who may be liable as defined in" 42 U.S.C. § 2014(t).

during the times that cloud passed over Indian reservations and to reappear again as soon as the cloud left Indian land. Thus, tribal courts should have jurisdiction over a PLA and the defendant can elect to remove such a case to federal court pursuant to 42 U.S.C. § 2210(n)(2).

IV. Application of the Price-Anderson Statutory System to This Case.

A. All Tribal Law Causes of Action Are Extinguished.

The Price-Anderson Act does not expressly divest tribal courts of jurisdiction. However, like all prior state law causes of action, all tribal causes of action have been extinguished. Justice Kleinfeld was correct in stating that there are no longer any tribal remedies to exhaust. *El Paso Natural Gas Co. v. Neztsosie*, 136 F.3d 610, 621 (9th Cir. 1998) (Kleinfeld, J., dissenting) ("There can be no claim for which exhaustion in tribal court can be required."), *cert. granted*, 67 USLW 3024 (U.S. Oct. 13, 1998) (No. 98-6).

B. The Tribal Court Has Jurisdiction Over a PLA and Must Apply Rules of Decision that are Consistent with the Federal Preemption of Nuclear Safety.

When Congress enacted the Amendments Act, it required all courts adjudicating a PLA to apply only those rules of decision which were consistent with the overall federal preemption of nuclear safety. 42 U.S.C. § 2014(hh). A tribal court must do the same. When Congress created the PLA, it specifically labeled that action in the singular, and clearly established only one cause of action: "***A*** public liability ***action*** shall be deemed to be ***an***

action arising under . . . and the substantive rules for decision in ***such action***. . . ." *Id.* (emphasis added). Thus, the statutory language allows for only one cause of action: the PLA. Further, state or tribal law causes of action are not "rules for decision" in a PLA cause of action – they are totally ***different causes of action*** which have been extinguished and supplanted by the PLA.

Since the PLA is the ***sole*** cause of action authorized by Congress, there cannot also be a ***different*** cause of action by which a plaintiff can obtain recovery. *See In re TMI*, 940 F.2d at 854 ("the consequence of a determination that a particular plaintiff has failed to state a public liability claim . . . is that he has no such claim at all."); *O'Conner*, 13 F.3d at 1100. Accordingly, no tribal law causes of action can be used to obtain recovery from an alleged injury covered by Price-Anderson.

C. The Standard of Care Must be the Applicable Federal Dose Limits or the NCRP and ICRP Recommendations from Which They Were Taken.

Section 2014(hh) preempts state law standards of care that conflict with the federal (NRC, DOE or AEC) safety standards establishing permissible dose limits for workers or the general public. *See In re TMI*, 67 F.3d at 1106 ("we found federal preemption of state tort law on the applicable standard of care"); *In re TMI*, 940 F.2d at 858 ("Two Supreme Court cases [*Pacific Gas* and *Silkwood*] indicate that the duty the defendants owe the plaintiffs in tort is dictated by federal law."); *O'Conner*, 13 F.3d at 1105. Only federal nuclear safety standards can provide the standard of care in a PLA. "Imposing a standard of care other than the federal regulations would disturb the

carefully crafted balance between private involvement and safety that Congress has achieved." *Id.*

To sustain a PLA a plaintiff must establish a dose that exceeds the applicable federal dose limits and causation. Such requirements achieve coherence and consistency between the AEA, the Price-Anderson Act and the federal regulations governing permissible doses. *See O'Conner*, 748 F. Supp. at 678. ("There are two aspects of the federal regulatory scheme governing the operation of nuclear powerplants which are relevant to the issues here. One is the federal regulatory framework governing the permissible dose limits allowed at nuclear power plants. The other is the regulatory framework governing actions for claims arising out of the doses received at the plant.").

Eleven appellate and district courts have held that the federal dose limits "constitute the applicable standard of care."[9] As the Eleventh Circuit explained:

> Virtually every federal court to consider the issue, including three circuit courts of appeals, have held that "federal regulations must provide the sole measure of the defendants' duty in a public liability cause of action." . . . This is because "any state duty would infringe upon pervasive federal regulations in the field of

[9] *Roberts*, 146 F.3d at 1308; *In re TMI*, 67 F.3d 1103; *O'Conner*, 13 F.3d 1090; *McLandrich v. Southern California Edison Co.*, 942 F. Supp. 457 (S.D. Cal. 1996); *Smith v. General Elec. Co.*, 938 F. Supp. 70 (D. Mass. 1996); *Bohrmann*, 926 F. Supp. 211; *Corcoran v. New York Power Auth.*, 935 F. Supp. 376 (S.D.N.Y. 1996); *Whiting v. Boston Edison Co.*, 891 F. Supp. 12 (D. Mass. 1995); *Coley v. Commonwealth Edison Co.*, 768 F. Supp. 625 (N.D. Ill. 1991); *Hennessy v. Commonwealth Edison Co.*, 764 F. Supp. 495 (N.D. Ill. 1991); *O'Connor*, 748 F. Supp. at 678.

> nuclear safety, and thus would conflict with the federal law." . . . Moreover, the federal statutory scheme limits the liability of operators of nuclear power facilities and provides for indemnification but does so against a stringent regulatory background. Therefore, as the Seventh Circuit Court of Appeals noted, "[i]mposing a standard of care other than the federal regulations would disturb the carefully crafted balance between private involvement and safety that Congress has achieved." [citation omitted] Consequently, we join those courts in holding the federal safety regulations conclusively establish the duty of care owed in a public liability action.

Roberts, 146 F.3d at 1308 (citations omitted).

The federal permissible dose limits must necessarily provide the duty owed in a PLA because the federal preemption of nuclear safety has been expressed in the permissible dose limits. *Silkwood*, 464 U.S. at 240-41 (federal government occupies entire field of nuclear safety "states are precluded from regulating the safety aspects of nuclear energy."); *Pacific Gas*, 461 U.S. at 212 ("the Federal Government maintains complete control of the safety and 'nuclear' aspects of energy generation . . . [and] has occupied the entire field of nuclear safety concerns."); *O'Conner*, 13 F.3d at 1105; *In re TMI*, 67 F.3d 1106-07 ("*TMI II* decided this issue by preempting state tort law on the standard of care."); *In re TMI*, 940 F.2d at 858. Any other standard would be inconsistent with the objectives of federal law:

> [W]e believe that the federal regulations must provide the ***sole measure of the defendants' duty*** in a public liability cause of action. . . . Imposing a standard of care other than the federal regulations would disturb the carefully crafted balance

> between private involvement and safety that Congress has achieved. ***Thus, the application of something other than the federal safety regulations as a standard of care is inconsistent with the Price-Anderson scheme and consequently cannot be applied in a public liability action.***

O'Conner, 13 F.3d at 1105 (some internal citations omitted) (emphasis added).[10] As the Third Circuit Court explained:

---

[10] ALARA (As Low As Reasonably Achievable) is a federally endorsed professional philosophy of excellence, not a permissible dose limit standard of care:

> ***Adoption of a standard as vague as ALARA would give no real guidance to operators and would allow juries to fix the standard case by case and plant by plant.*** An operator acting in the utmost good faith and diligence could still find itself liable for failing to meet such an elusive and undeterminable standard. Our holding protects the public and provides owners and operators of nuclear power plants with a definitive standard by which their conduct will be measured.

In re TMI, 67 F.3d at 1115 (emphasis added) (citations omitted). Allowing a jury to determine what is "reasonably achievable," would destroy the uniformity Congress sought to achieve in creating a single cause of action based on one standard of care and would turn federally preempted nuclear safety over to the opinion of a lay jury. *See id.* ("Adopting ALARA as part of the standard of care would put juries in charge of deciding the permissible levels of radiation exposure . . . issues that have explicitly been reserved to . . . NRC."). Six courts have expressly rejected ALARA as a standard of care. *See id.* at 1103; *McLandrich*, 942 F. Supp. at 467; *Smith*, 938 F. Supp. at 72 nn.3, 4; *Bohrmann*, 926 F. Supp. at 219-20; *Corcoran*, 935 F. Supp. at 386; *Akins v. Sacramento Mun. Util. Dist.*, 8 Cal. Rptr. 2d 785 (1992), *rev. dismissed*, 868 P.2d 905 (1994).

> The result is the same regardless of whether the state adopts stricter or more lenient safety standards. If stricter safety standards are imposed, the state will create a disincentive to nuclear power that is in conflict with federal law. If more lenient standards are imposed, the state will undercut federal safety efforts.

In re TMI, 940 F.2d at 860 n.22. Virtually every federal court to consider the issue has agreed with *O'Conner* and *In re TMI*.

> The permissible dose limits:
>
> are based upon the national and international scientific consensus as to the hypothetical risk from exposure to low . . . levels of . . . radiation . . . [and are] not expected to cause appreciable bodily injury. . . .

O'Conner, 748 F. Supp. at 677 (*quoting Johnston v. United States*, 597 F. Supp. 374, 424 (D. Kan. 1984)). "Appreciable bodily injury" means:

> any bodily injury or effect that the average person would regard as being objectionable and/or competent medical authorities would regard as being deleterious to the health and well being of the individual.

Johnston, 597 F. Supp. at 424-25. The historical development of the dose limits demonstrates the intense efforts that were invested by the federal government in effectuating the Act's dual purpose of developing the nuclear industry while safeguarding the public and workers who would benefit from and work in the industry. *See generally id.* at 390-92; *In re TMI*, 67 F.3d at 1110-1112. Congress has delegated to the NRC and DOE (and before them the AEC) decisions affecting public safety. These federal agencies have already achieved a balance between the

risks and the benefits presented by nuclear energy. *O'Conner*, 748 F. Supp. at 677-78. In *Silkwood*, this Court reasoned that Congress' decision to prohibit the states from regulating the safety standards of nuclear energy was:

> premised on its belief that the [NRC] was more qualified to determine what type of safety standards should be enacted in this complex area . . . Congress . . . provided for continued federal control over [radiation] because the technical safety considerations are of such complexity that it is not likely that any State would be prepared to deal with them.

Silkwood, 464 U.S. at 250. *See also Corcoran*, 935 F. Supp. at 389 ("It would be inconsistent with the Act to allow the plaintiffs to state a claim of any kind that is premised on an exposure to radiation which a federal agency, in its expertise, has concluded is not unsafe."). This is a classic example of the federal government making a policy decision, after appropriate consultation with experts in the field. If there are no applicable NRC or DOE regulations (or AEC regulations) to establish the duty owed by defendants in this case, the adjudicating court should adopt the national and international scientific consensus as presented in publications of the National Council of Radiation Protection and Measurements (NCRP) and International Commission of Radiological Protection (ICRP), upon which those NRC, DOE and AEC safety regulations are based. *Johnston*, 597 F. Supp. at 390-92. *See also, O'Conner v. Commonwealth Edison Co.*, 807 F. Supp. 1376, 1382-88 nn.3-6 (C.D. Ill. 1992), *aff'd*, 13 F.3d 1090 (7th Cir.), *cert. denied*, 512 U.S. 1222 (1994).

Any other approach would directly conflict with Congress' intent to encourage the development of the atomic energy industry. *O'Conner*, 13 F.3d at 1095; *In re TMI*, 940 F.2d at 852. Using the permissible dose limits as the sole standard of care achieves a fair balance for users of radioactive materials, workers and the general public:

> In a highly technical field such as this, although a plaintiff should be provided a very high level protection from excessive exposure from radiation, a defendant public utility should also be provided with some clear statement regarding how it may limit a worker's dose without exposing the worker to injury or itself to liability.

O'Conner, 748 F. Supp. at 678.

D. Congress Allows Strict Liability in a PLA Only When the NRC or DOE Declares an ENO.

The Amendments Act allows its form of strict liability only after the NRC or the DOE determines that there has been an "extraordinary nuclear occurrence" ("ENO").[11] 42 U.S.C. § 2210(n)(1). Only in an ENO does Price-Anderson require a defendant to "waive (I) any issue or defense as to conduct of the claimant or fault of persons indemnified . . . . " *Id.*; *In re TMI*, 940 F.2d at 852; *O'Conner*, 748 F. Supp. at 675 (waiver of defenses is only applicable to ENO and not to nuclear incidents). Because the NRC has not declared an ENO here, strict liability concepts cannot be applied either by a state or tribal court.

---

[11] *See supra* note 3.

CONCLUSION

This case should be remanded with directions that for Price-Anderson issues tribal law and tribal courts should be treated as state law and state courts under the Act. All tribal causes of action for nuclear incidents have been extinguished, only a PLA can be litigated from plaintiffs' allegations in federal, state or tribal court and defendants have a right of removal to federal court.

Respectfully submitted,

DONALD E. JOSE
Counsel of Record
DAVID WIEDIS
JOSE & WIEDIS
Goshen Executive Center
1450 E. Boot Road
Suite 300B
West Chester, PA 19380
(610) 436-1888
Attorneys for Amicus Curiae
American Nuclear Insurers

Supreme Court, U.S.
FILED
DEC 8 1998
CLERK

(9)

No. 98-6

IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

EL PASO NATURAL GAS COMPANY, *et al.*,
Petitioners,

v.

LAURA NEZTSOSIE, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICUS CURIAE* NATIONAL MINING ASSOCIATION IN SUPPORT OF PETITIONERS

Of Counsel:
HAROLD P. QUINN, JR.
KATIE SWEENEY
NATIONAL MINING ASSOCIATION
1130 17th Street, N.W.
Washington, D.C. 20036

JAMES B. HAMLIN
(Counsel of Record)
ANTHONY J. THOMPSON
EDWARD C. SCHWEITZER, JR.
SHAW PITTMAN POTTS & TROWBRIDGE
2300 N Street, N.W.
Washington, D.C. 20037
(202) 663-8000
Attorneys for *Amicus Curiae*

December 8, 1998

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

34pp

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF *AMICUS CURIAE*	1
SUMMARY OF ARGUMENT	3
ARGUMENT	5
I. PRICE-ANDERSON PROVIDES THE EXCLUSIVE REMEDY FOR CLAIMS ARISING FROM NUCLEAR INCIDENTS AND GIVES DEFENDANTS AN ABSOLUTE RIGHT TO HAVE SUCH CLAIMS DECIDED IN A SINGLE FEDERAL COURT	5
A. Price-Anderson Is One of Many Incentives Offered by the Federal Government To Promote Nuclear Energy	5
B. The Objective of Price-Anderson Is To Compensate the Victims of a Nuclear Incident Quickly and Uniformly, While Limiting the Liability of Contractors and Licensees	8
1. Price-Anderson Makes All Claims Arising From a Nuclear Incident Federal Claims	12
2. Price-Anderson Gives Defendants the Right To Remove All Claims Arising From a Nuclear Incident to United States District Court	14
C. Price-Anderson Preempts State-Law Claims Otherwise Arising From a Nuclear Incident and Necessarily Preempts Any Similar Tribal-Law Claims	15
II. THE FEDERAL REMEDIAL SCHEME IS INCOMPATIBLE WITH TRIBAL COURT ADJUDICATION	17
CONCLUSION	28

TABLE OF AUTHORITIES

Cases	Page
Aquatherm Indus., Inc. v. Florida Power & Light Co., 84 F.3d 1388 (11th Cir. 1996)	27
Arizona Public Serv. Co. v. Aspaas, 77 F.3d 1128 (9th Cir. 1995)	25
Becenti v. Vigil, 902 F.2d 777 (10th Cir. 1990)	21
Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831)	17
DeCoteau v. Sentry Ins. Co., 915 F. Supp. 155 (D.N.D 1996)	21
Duncan Energy Co. v. Three Affiliated Tribes, 27 F.3d 1294 (8th Cir. 1994)	25
Enlow v. Moore, 134 F.3d 993 (10th Cir. 1998)	24
FMC v. Shoshone-Bannock Tribes, 905 F.2d 1311 (9th Cir. 1990)	24
Gulf Offshore Co. v. Mobil Oil Corp., 453 U.S. 473 (1981)	27
Hapgood v. City of Warren, 127 F.3d 490 (6th Cir. 1997)	27
Iowa Mutual Ins. Co. v. LaPlante, 480 U.S. 9 (1987)	25
Kerr-McGee Corp. v. Farley, 115 F.3d 1498 (10th Cir. 1997), *cert. denied*, 118 S. Ct. 880 (1998)	21
Lane v. Central Bank of Alabama, N.A., 756 F.2d 814 (11th Cir. 1985)	27
LaBeau v. Dakota, 815 F. Supp. 1074 (W.D. Mich. 1993)	25
Maine v. Thiboutot, 448 U.S. 1 (1980)	27
Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304 (1816)	14, 24
Montana v United States, 450 U.S. 544 (1981)	20, 26
Mustang Prod. Co. v. Harrison, 94 F.3d 1382 (10th Cir. 1996), *cert. denied*, 117 S. Ct. 1288 (1997)	24
Nieman v. NLO, Inc., 108 F.3d 1546 (6th Cir. 1997)	15
O'Conner v. Commonwealth Edison Co., 13 F.3d 1090 (7th Cir. 1994)	15
Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978)	17

TABLE OF AUTHORITIES—Continued

	Page
Roberts v. Florida Power & Light Co., 146 F.3d 1305 (11th Cir. 1998)	15
Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978)	25
Silkwood v. Kerr-McGee Corp., 464 U.S. 238 (1984)	10, 15, 16
Strate v. A-1 Contractors, 117 S. Ct. 1404 (1997)	10, 14, 16, 26
Tafflin v. Levitt, 493 U.S. 455 (1990)	27
Tennessee v. Davis, 100 U.S. 257 (1880)	14, 16
In re TMI Litig. Cases Consol. II, 940 F.2d 832 (3d Cir. 1991)	15
United States v. Tsosie, 92 F.3d 1037 (10th Cir. 1996)	21
UNC Resources, Inc. v. Benally, 518 F. Supp. 1046 (D. Ariz. 1981)	18
Washington v. Confederated Tribes of Colville, 447 U.S. 134 (1980)	16
Weso v. Menominee Indian School Dist., 915 F. Supp. 73 (E.D. Wis. 1995)	21
Wilson v. Marchington, 127 F.3d 805 (9th Cir. 1997), *cert. denied*, 118 S. Ct. 1516 (1998)	23
Yellow Freight System, Inc. v. Donnelly, 494 U.S. 820 (1990)	27
Statutes and Regulations	
7 Navajo Nation Code § 354(C)	20
Code of the Winnebago Tribe § 2-111	22
Colville Tribal Code § 4.1.11	22
18 U.S.C. § 1961 *et seq.*	26
25 U.S.C. § 476	18
25 U.S.C. § 3601 *et seq.*	25
28 U.S.C. § 1257	25
28 U.S.C. § 1404	20
28 U.S.C. § 1407	21
28 U.S.C. § 1441	21
28 U.S.C. § 1738	23
Price-Anderson Act, 42 U.S.C. §§ 2012-2014, 2210	*passim*
Pub. L. No. 89-645, 80 Stat. 891 (1966)	9, 10

TABLE OF AUTHORITIES—Continued

Page

Pub. L. No. 100-408, 102 Stat. 1076 (1988) 13
25 C.F.R. Part 11 (1998) 17, 18, 19

Legislative History

H. CONF. REP. No. 103-383, *reprinted in* 1993 U.S.C.C.A.N. 2453 25
H.R. REP. No. 100-104, Part 1 (1987) 12, 13
S. REP. No. 100-218 (1988), *reprinted in* 1988 U.S.C.C.A.N. 1476 ..... 8, 11, 12
S. REP. No. 100-70 (1988), *reprinted in* 1988 US.C.C.A.N. 1424 ..... 5, 8, 9
S. REP. No. 1605 (1966), *reprinted in* 1966 U.S.C.C.A.N. 3201 ..... 9, 10

Miscellaneous

HOLGER ALBRETHSEN & FRANK E. MCGINLEY, DOE, SUMMARY HISTORY OF DOMESTIC URANIUM PROCUREMENT UNDER U.S. ATOMIC ENERGY COMM'N CONTRACTS: FINAL REP'T, (1982) 6
Fredric Brandfon, Comment, *Tradition and Judicial Review in the American Indian Tribal Court System*, 38 UCLA L. REV. 991 (1991) 17
BUREAU OF INDIAN AFFAIRS, NATIVE AMERICAN TRIBAL COURT PROFILES (1985) 19, 20
William C. Canby, Jr., *Civil Jurisdiction and the Indian Reservation*, 1973 UTAH L. REV. 206 .... 18, 19
Robert N. Clinton, *Tribal Courts and the Federal Union*, 26 WILLIAMETTE L. REV. 841 (1990) 23
COMPTROLLER GENERAL OF THE UNITED STATES, CLEANING UP COMMINGLED URANIUM MILL TAILINGS: IS FEDERAL ASSISTANCE NECESSARY? (Feb. 5, 1979) 7
Robert D. Cooter & Wolfgang Fikentscher, *Indian Common Law: The Role of Custom in American Indian Tribal Courts*, 48 AM. J. COMP. L. 287 (1998) 19
VINE DELORIA, JR. & CLIFFORD M. LYTLE, AMERICAN INDIANS, AMERICAN JUSTICE (1983) 17, 18, 19

TABLE OF AUTHORITIES—Continued

Page

B.J. Jones, *Welcoming Tribal Courts into the Judicial Fraternity*, 24 WM. MITCHELL L. REV. 457 (1998) 19
Timothy W. Joranko, *Exhaustion of Tribal Remedies in the Lower Courts After National Farmers Union and Iowa Mutual*, 78 MINN. L. REV. 259 (1993) 25
Melissa L. Koehn, *Civil Jurisdiction: The Boundaries Between Federal and Tribal Courts*, 29 ARIZ. ST. L.J. 705, 712 (1997) 19
Robert Laurence, *Full Faith and Credit in Tribal Courts*, 28 N.M.L. REV. 19 (1998) 23
Nell Jessup Newton, *Tribal Court Praxis: One Year in the Life of Twenty Indian Tribal Courts*, 22 AM. INDIAN L. REV. 285 (1998) 22
1 OFFICE OF NUCLEAR MATERIAL, UNITED STATES NUCLEAR REGULATORY COMM'N, FINAL GENERIC ENVIRONMENTAL IMPACT STATEMENT ON URANIUM MILLING (NUREG-0706) (Sept. 1980) 6
FRANK POMMERSHEIM, BRAID OF FEATHERS (1995) 17
Janet Reno, *A Federal Commitment to Tribal Justice Systems*, 79 JUDICATURE 113 (1995) 26
Judith Resnik, *Dependent Sovereigns: Indian Tribes, States and the Federal Courts*, 56 U. CHI. L. REV. 671 (1989) 23
Laurie Reynolds, *Adjudication in Indian Country: The Confusing Parameters of State, Federal, and Tribal Jurisdiction*, 38 WM. & MARY L. REV. 539 (1997) 20
Laurie Reynolds, *Exhaustion of Tribal Remedies: Extolling Tribal Sovereignty While Expanding Federal Jurisdiction*, 73 N.C.L. REV. 1089 (1995) 26
Laurie Reynolds, *"Jurisdiction" in Federal Indian Law*, 27 N.M.L. REV. 359 (1997) 25
Michael Taylor, *Modern Practice in the Indian Courts*, 10 U. PUGET SOUND L. REV. 231 (1987) .. 20, 23

TABLE OF AUTHORITIES—Continued

	Page
UNITED STATES DEP'T OF THE INTERIOR, MINERAL REVENUES 1997 (1998)	2
Gloria Valencia-Weber, *Tribal Courts: Custom and Innovative Law*, 24 N.M.L. REV. 225 (1944)	18, 19, 20, 23
Carey N. Vicenti, *The Reemergence of Tribal Society and Traditional Justice Systems*, 79 JUDICATURE (1995)	19
Blake A. Watson, *The Curious Case of Disappearing Federal Jurisdiction Over Federal Enforcement of Federal Law*, 80 MARQ. L. REV. 531 (1997)	17
James W. Zion & Robert Yazzie, *Indigenous Law in North America in the Wake of Conquest*, 20 B.C. INT'L & COMP. L. REV. 55 (1997)	20

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

No. 98-6

EL PASO NATURAL GAS COMPANY, *et al.*,
Petitioners,
v.
LAURA NEZTSOSIE, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICUS CURIAE* NATIONAL MINING ASSOCIATION IN SUPPORT OF PETITIONERS

INTEREST OF *AMICUS CURIAE*

The National Mining Association ("Association")[1] is a trade association representing producers of most of America's coal, metals, and industrial and agricultural minerals. Its membership also includes manufacturers of mining and mineral processing machinery and supplies, transporters, financial and engineering firms, and other businesses related to mining. The Association's membership includes approximately 70% of the companies in the

[1] No party or its counsel has authored any part of the Association's brief. No person or entity other than the Association and its counsel has made a monetary contribution to the preparation or submission of this brief.

current domestic uranium industry, many of which have or had operations on or near Indian reservations. The principal purpose of the Association is to represent those with interests in the nation's mineral resources industries in the important public policy issues affecting the development and use of mineral resources. To that end, the Association seeks to develop policies that will foster the efficient production, distribution and use of mineral products.

The mining companies in this case are merely examples of many such companies that worked closely with the federal government to create this country's domestic uranium industry and to promote its nuclear energy program in the 1940s, 1950s and 1960s. The decision below, as it stands, may result in a dramatic expansion of tribal court jurisdiction over the activities of non-Indians, including many Association members who worked closely with the federal government in developing nuclear energy. In the United States today, more than 45 different Indian tribes lease out portions of their reservation lands for mining operations. *See* UNITED STATES DEP'T OF THE INTERIOR, MINERAL REVENUES 1997, at 84 (1998). More than 2.1 million acres of Indian lands were under lease for mining purposes in 1997, with revenues exceeding $200 million. *Id.* at 83, 124-25. These mining operations are potentially affected by an expansion of tribal court jurisdiction to include claims based on federal statutes. The Ninth Circuit's rationale is not limited to the Price-Anderson Act, but could be extended to other federal statutes. Nor is the Ninth Circuit's decision limited to current mining operations. The uranium mining at issue here took place 30-40 years ago, but the court of appeals made no effort to determine whether there was any reason for the mining companies to believe that they were subjecting themselves to tribal court jurisdiction when they began—or even when they ceased—operations on the reservations. Other Association members may be

brought into tribal court for long-terminated activities if the Ninth Circuit's decision is allowed to stand.

Counsel for the parties have consented to the filing of this *amicus* brief. Their letters of consent have been filed with the Clerk.

SUMMARY OF ARGUMENT

The district court enjoined the respondents from prosecuting their claims "to the extent that [respondents] seek relief based upon the Price-Anderson Act in tribal court." *El Paso Natural Gas Co. v. Neztsosie*, 136 F.3d 610, 613 (9th Cir. 1998). The Ninth Circuit, acting *sua sponte*, reversed the injunction because it could find nothing in the Price-Anderson Act, 42 U.S.C. §§ 2012-2014, 2210 ("Price-Anderson"), expressly prohibiting tribal courts from adjudicating Price-Anderson claims. The decision of the court of appeals should be reversed because it seriously undermines Congress' statutory scheme to provide a uniform federal remedy and a federal forum to resolve all claims arising out of a nuclear incident. The federal remedial scheme is wholly incompatible with tribal-court adjudication of such claims.

Price-Anderson is an essential part of a comprehensive federal program to develop and regulate nuclear energy. It provides a comprehensive remedial system to assure public compensation in the event of a nuclear accident and to limit the liability of private participants in the nuclear industry. This limitation of liability was one of several incentives that the federal government provided to encourage private companies to participate with it in developing nuclear energy. The Act establishes procedures for efficient and uniform resolution of all claims resulting from any nuclear incident, including the absolute right of removal to a single federal court. Just as the Atomic Energy Act as a whole preempts any non-federal attempt to regulate nuclear energy, Price-Anderson preempts all other laws in the field it occupies, in keeping with the

overriding congressional intent to provide a uniform federal remedy subject to adjudication in a federal court for all claims resulting from a nuclear incident.

Adjudication of such claims in tribal courts is incompatible with the comprehensive federal regulation of nuclear energy and the federal remedial scheme that applies to all claims arising from nuclear incidents. There are more than 150 tribal courts in operation today, applying different tribal laws in accordance with varying procedures and judicial philosophies. Under the Ninth Circuit's rationale, any of these courts would have jurisdiction to hear and decide Price-Anderson claims. This could produce anomalous results because some courts do not consider themselves bound to apply federal law when it conflicts with tribal law. Thus, there is no guarantee that a tribal court would apply Price-Anderson (and the federal cases interpreting it) to claims arising out of a nuclear incident. Moreover, the defendant sued in tribal court would probably be precluded from removing to federal court. Both the general federal removal statute and Price-Anderson's special removal provision authorize removal only from state courts. At the conclusion of the tribal court proceedings, the defendant would have no certain means of assuring a review on the merits in the federal courts. It is clear that the federal district courts may review a tribal court's *jurisdictional* determination. But it is not at all clear that any appellate mechanism would be available by which the tribal court's decision on the *merits* could be reviewed in federal court. As a result, the federal court system—and ultimately this Court—could lose control over the interpretation and application of an important federal statute and important federal policies.

In summary, tribal court adjudication would frustrate federal regulation of nuclear energy and the three main purposes of the Price-Anderson Act: (1) to create a federal-law remedy that would be consistently applied to all nuclear incidents; (2) to assure a single federal forum

for resolution of the claims; and (3) to assure uniformity in the treatment of all claims—uniformity that can be assured only if all judicial decisions are subject to ultimate review in this Court.

ARGUMENT

I. PRICE-ANDERSON PROVIDES THE EXCLUSIVE REMEDY FOR CLAIMS ARISING FROM NUCLEAR INCIDENTS AND GIVES DEFENDANTS AN ABSOLUTE RIGHT TO HAVE SUCH CLAIMS DECIDED IN A SINGLE FEDERAL COURT

A. Price-Anderson Is One of Many Incentives Offered by the Federal Government To Promote Nuclear Energy

Price-Anderson was enacted in 1957 as section 170 of the Atomic Energy Act of 1954. It was intended "to remove a major deterrent to private participation in the development of nuclear energy" by setting a limit on the liability of private industry in the event of a nuclear accident. S. REP. No. 100-70, at 13 (1988), *reprinted in* 1988 U.S.C.C.A.N. 1424, 1426. Limiting the liability of persons responsible for nuclear incidents was, Congress found, "in the interest of the general welfare and of the common defense and security." 42 U.S.C. § 2012(i). Price-Anderson, however, was only one of many ways in which Congress attempted to encourage private industry to participate with the federal government in developing nuclear energy. Price-Anderson must be seen in that wider context.

Beginning in 1946, when the Atomic Energy Act was originally passed, the federal government saw an urgent need to discover sources of uranium in the United States and to advance the technology necessary to extract and concentrate uranium from ore. Encouraged, sponsored, licensed and closely regulated by what was then the Atomic Energy Commission ("AEC"), mining companies increased the known mineable reserves of uranium ore in

the United States ninety-fold between 1946 and 1959.[2] Nearly all of these reserves are located in the western United States, on or near Indian reservations.

Because the AEC wanted to purchase uranium concentrate rather than uranium ore, it encouraged mining companies to build and operate government-licensed processing mills. As an incentive, the AEC offered contracts under which the AEC agreed to purchase uranium concentrate at a price that would allow the private company to recover its cost of constructing and operating the processing mill over the life of the contract.[3] The AEC's program to develop a domestic uranium industry reached its peak in 1961, when 27 processing mills were operating. *Id.* In fact, the AEC's program was too successful, producing more uranium than the AEC could use. Because the AEC was effectively the only buyer for uranium at the time,[4] the number of active uranium mills and the quantity of uranium they produced dropped sharply between 1967 and 1970, as the AEC scaled back its purchases. URANIUM MILLING at 2-2.

---

2 *See* 1 OFFICE OF NUCLEAR MATERIAL, UNITED STATES NUCLEAR REGULATORY COMM'N, FINAL GENERIC ENVIRONMENTAL IMPACT STATEMENT ON URANIUM MILLING (NUREG-1706) at 2-1 - 2-4 (Sept. 1980) (history of uranium milling and status of inactive uranium milling operations) (hereafter "URANIUM MILLING"). Known mineable reserves were 900,000 metric tons in 1946 and 81,000,000 metric tons in 1959. *Id.* at 2-1.

3 *See* HOLGER ALBRETHSEN & FRANK E. MCGINLEY, DOE, SUMMARY HISTORY OF DOMESTIC URANIUM PROCUREMENT UNDER U.S. ATOMIC ENERGY COMM'N CONTRACTS: FINAL REP'T, at 8 (1982) (hereafter "URANIUM PROCUREMENT").

4 Between 1948 and 1970, the AEC purchased about 300,000 metric tons of uranium (U_3O_8), more than half of that (with a value of $3 billion) domestically produced. URANIUM MILLING at 2-1. During most of this period, the federal government was the only buyer for uranium concentrate. The first private sale of uranium concentrate occurred in 1966, under a license from the AEC. URANIUM PROCUREMENT at 5.

The AEC's contracts with uranium-mining and processing companies were exceptionally detailed and comprehensive. They did not, however, include provisions governing disposal of the sand-like radioactive waste (called "mill tailings") produced when the raw uranium was processed, except to specify that the mill tailings should be stockpiled near the plant. At the time, there appeared no reason to do more. Until the mid-1970s—after most uranium mines and mills, including those at issue in this case, had shut down—the AEC concluded from all the available information that the mill tailings were essentially harmless. Because the contracts were supposed to compensate mining companies for their costs, requiring the mining companies to do more would have cost the government more. As the Comptroller General of the United States acknowledged in 1978, mill owners

> acted in good faith in carrying out their responsibilities in meeting contract provisions and Federal regulations. Unfortunately, like the Federal Government, they did not recognize that the tailings were a potential health hazard, and did not provide for their control.

COMPTROLLER GENERAL OF THE UNITED STATES, CLEANING UP COMMINGLED URANIUM MILL TAILINGS: IS FEDERAL ASSISTANCE NECESSARY? at iv (Feb. 5, 1979). The federal government thus had a "strong moral responsibility" to share in the cost of cleaning up the mill tailings that had been "generated under Federal contracts." *Id.* at v.

The waste from uranium mining and processing that allegedly injured the respondents was generated under federal contracts by private companies working closely with the federal government in support of a comprehensive federal program to promote the national interest in nuclear energy. Those private companies were effectively acting as agents of the federal government in furtherance of an important federal policy. They could not have

imagined that their actions on behalf of the federal government and in compliance with federal regulations would expose them to unlimited liability (including punitive damages) under tribal law in a tribal court. Congress intended them to rely—and presumably they did rely—on the federal government to define through regulation the limits of nuclear safety and on the protections offered by Price-Anderson.

B. The Objective of Price-Anderson Is To Compensate the Victims of a Nuclear Incident Quickly and Uniformly, While Limiting the Liability of Contractors and Licensees

Price-Anderson has been amended several times, most substantially in 1988. From the beginning, however, Congress has attempted to strike a balance between two fundamental but conflicting objectives: to compensate those injured by a nuclear accident; and "to set a limit on the liability of private industry to remove a major deterrent to private participation in the development of nuclear energy." S. REP. No. 100-70, at 13.

Price-Anderson was originally designed to provide "a comprehensive, compensation-oriented system of liability insurance for Department of Energy ["DOE"] contractors and Nuclear Regulatory Commission ["NRC"] licensees operating nuclear facilities." S. REP. No. 100-70, at 14. The Price-Anderson "system" has three principal components: (1) a limit on the aggregate liability of DOE contractors and NRC licensees; (2) "channeling of liability" for all damages resulting from a nuclear incident to the DOE contractor or NRC licensee, "even though other parties (such as subcontractors or suppliers) might be liable under conventional tort principles"; and (3) a commitment by the federal government to indemnify DOE contractors and NRC licensees for any liability claims that exceed the amount of financial protection that the contractors and licensees can obtain from private insurers. *Id.* *See* S. REP. No. 100-218, at 2 (1988), *reprinted in* 1988 U.S.C.C.A.N. 1476, 1477. In short, Congress intended Price-Anderson to provide a "unified and efficient approach to processing and settlement of claims, thus allowing quick compensation to the public from the pool of funds set up by the Price-Anderson system." S. REP. No. 100-70, at 14.

In 1966, Congress amended Price-Anderson to add a provision for consolidating, in a single federal district court, suits resulting from an "extraordinary nuclear occurrence" (one which the NRC judged to involve a "substantial" release of radioactive materials). Pub. L. No. 89-645, 80 Stat. 891 (1966) (amended in 1988). Congress had several reasons for this 1966 amendment that are relevant to the issues now before the Court. In particular, Congress intended the 1966 amendment to "reduce the likelihood of unequal treatment of victims" of a nuclear incident. S. REP. No. 1605 (1966), *reprinted in* 1966 U.S.C.C.A.N. 3201, 3207.

Even in the event of an "extraordinary" nuclear incident, Congress expected that "relatively few claims" would actually be litigated. *Id.* at 3215. Nevertheless, Congress tried to ensure that "a claimant who does feel constrained to take his claim to court should not be subjected to procedural requirements different from those some other claimant might face." *Id.* One victim of a nuclear incident, Congress said, should not "be subject to different substantive and procedural laws than would apply to another victim simply by reason of an invisible State boundary line that separates them." *Id.* at 3208. Congress concluded that an "absolute right of removal" to a single federal court was necessary to assure "more expeditious and uniform treatment of all parties" following a major nuclear incident. *Id.* at 3215.[5]

---

[5] As Senate Report 1605 notes, "If the circumstances of the occurrence and the damage actions did not appear to the Commission or to the defendant to necessitate removal to this single Federal court, an action started in a State court or other Federal court

The 1966 amendment made no mention of tribal courts, referring specifically only to removal from "any State court." Pub. L. No. 89-645, 89 Stat. 891, § 3. Permitting tribal courts but not state courts to retain jurisdiction over claims arising from an "extraordinary nuclear occurrence" would, however, have been contrary to the very purpose for providing an "absolute right of removal" to the federal district court in the district where the "extraordinary nuclear occurrence took place." Congress intended to provide for consolidation of "*all suits* arising out of a serious nuclear incident." S. REP. No. 1605, 1966 U.S.C.C.A.N. at 3208 (emphasis added). *Accord id.* at 3215 ("all law suits arising from an 'extraordinary nuclear occurrence' "; "all cases arising from the same set of circumstances"). Congress never intended that claims arising from a nuclear incident could be brought in tribal court.

This Court has made it clear that "[a]s to non-members . . . a tribe's adjudicative jurisdiction does not exceed its legislative jurisdiction" unless Congress expressly enlarges tribal-court jurisdiction. *Strate v. A-1 Contractors*, 117 S. Ct. 1404, 1413 (1997). Congress did not expressly enlarge tribal-court jurisdiction to hear claims arising from a serious nuclear incident when it amended Price-Anderson in 1966. On the contrary, Congress clearly intended that "the rights of persons who are injured are established by State law." S. REP. No. 1605, 1966 U.S.C.C.A.N. at 3226. In other words, Congress left no room for the Indian tribes to exercise legislative jurisdiction over liability arising from such a nuclear incident. Accordingly, tribal courts could have no adjudicative jurisdiction over such claims.[6]

---

could of course proceed to judgment in that court." 1966 U.S.C.C.A.N. at 3215.

[6] Originally, Congress gave the Atomic Energy Commission exclusive jurisdiction to regulate nuclear materials. *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 249-50 (1984). In 1959, Congress amended the Atomic Energy Act to allow a *state* to regulate

The number of claims resulting from the Three Mile Island ("TMI") accident in 1979 demonstrated to Congress that an absolute right of removal to a single federal court was required for claims arising from any nuclear incident. H.R. REP. No. 100-104, pt. I at 18 (1987). Although the TMI accident was not an "extraordinary nuclear occurrence," it "resulted in over 150 separate cases against TMI defendants, with over 3,000 claimants, in various state and Federal courts." S. REP. No. 100-218, at 13. Maintaining these similar cases in multiple jurisdictions was duplicative and inefficient. *Id.* It was an obstacle to "equitable and uniform treatment" of all victims of a nuclear incident. H.R. REP. No. 100-104, at 18. In testimony to Congress, attorneys for both plaintiffs and defendants agreed that consolidating these cases in a single federal court "would greatly benefit the process for determining compensation for claimants." S. REP. No. 100-218, at 13.

To promote prompt and uniform compensation for individuals injured as the result of a nuclear incident, Congress in 1988 amended Price-Anderson in two fundamental ways. *First*, Congress made *all* claims for damages arising from *any* nuclear incident federal claims, and *second*, it gave defendants, the NRC and DOE an absolute right to remove such claims to the federal district court for the district in which the nuclear incident occurred. This right of removal was intended to ensure that in the event of *any* nuclear incident, all claimants would be subject to the same substantive and procedural laws and that all claims would be handled uniformly and ex-

---

nuclear byproduct materials and some other nuclear materials *if* the state adopted a suitable regulatory program. *Id.* at 250. Congress continued to preclude states from regulating the more hazardous nuclear materials because, for those materials, "the technical safety considerations are of such complexity that it is not likely that any State would be prepared to deal with them during the foreseeable future." *Id.* (quoting H.R. REP. No. 86-1125, 3 (1959)). Congress gave no regulatory authority over nuclear materials to Indian tribes.

peditiously. H.R. REP. No. 100-104, at 18 ("equitable and uniform treatment of victims"); S. REP. No. 100-218, at 13 (avoiding "the inefficiencies resulting from duplicative determinations of similar issues in multiple jurisdictions").

In 1988, as in 1966, Congress made no reference to tribal courts. Nevertheless, in 1988 (as in 1966) permitting tribal courts to adjudicate claims arising from a nuclear incident—made federal claims in 1988—would have been directly contrary to Congress' intent to ensure that victims of a nuclear incident would be treated uniformly and that liability be determined efficiently.

1. *Price-Anderson Makes All Claims Arising From a Nuclear Incident Federal Claims*

As amended in 1988, Price-Anderson, through a series of interlocking definitions, makes all claims arising from a "nuclear incident" federal claims. Moreover, "nuclear incident" is broadly defined to include both injuries caused by radiation and those caused by the toxic characteristics of mine tailings *other than* radioactivity.

- Price-Anderson defines "public liability action" as "*any* suit asserting public liability" and expressly states that any "public liability action shall be deemed to be an action arising under section 2210 of this title." 42 U.S.C. § 2014(hh) (emphasis added). Thus, a public liability action arises under federal law. Congress intended the 1988 amendments to "satisfy the Article III requirement that federal courts have jurisdiction over cases arising under the Constitution or under the laws of the United States." S. REP. No. 100-218, at 13.[7]

[7] The "substantive rules for decision" in a "public liability action" are "derived from the law of the State in which the nuclear incident involved occurs"—but only to the extent that law is consistent with the provisions of section 2210. The House Report on the amendments specifically noted that Congress had "used this approach in the Outer Continental Shelf Lands Act." H.R. REP. No. 100-104, Part 1, at 18 (1987). The definition of "public liability action" was added in 1988. Price-Anderson Amendments Act of 1988, Pub. L. 100-408, § 11(b). The other, related definitions were already part of Price-Anderson.

- "Public liability," in turn, is "*any* legal liability arising out of or resulting from a nuclear incident or cautionary evacuation" (apart from three exceptions irrelevant here). 42 U.S.C. § 2014(w) (emphasis added).[8]
- "Nuclear incident" means "any occurrence, including an extraordinary nuclear occurrence, within the United States causing, within or outside the United States, bodily injury, sickness, disease, or death, or loss of or damage to property, or loss of use of property, arising out of or resulting from the radioactive, toxic, explosive, or other hazardous properties of source, special nuclear, or byproduct material." 42 U.S.C. § 2014(q). "Source material" includes uranium and ores containing uranium in significant concentration, § 2014(z); "byproduct material" includes "the tailings or wastes produced by the extraction or concentration of uranium or thorium from any ore processed primarily for its source material content," § 2014(e).

In short, *any* claim based on bodily injury, sickness, disease, death or property damage resulting either from the radioactive or from the other hazardous or toxic properties of uranium, uranium ores, or the tailings and wastes

[8] The three exceptions under section 2014(w) underscore how sweeping Price-Anderson's definition of "public liability" is. The exceptions are "(i) claims under State or Federal workmen's compensation acts of employees of persons indemnified who are employed at the site of and in connection with the activity where the nuclear incident occurs; (ii) claims arising out of an act of war; and (iii) whenever used in subsections (a), (c), and (k) of section 2210 of this title, claims for loss of, or damage to, or loss of use of property which is located at the site of and used in connection with the licensed activity where the nuclear incident occurs."

produced by extracting or concentrating uranium from uranium-bearing ores is a federal claim. All the claims at issue in this case—and any similar claims in other future cases—are federal claims. By prescribing that the "substantive rules for decision" in "*any* suit" arising from a nuclear incident "shall be derived from the law of the State in which the nuclear incident occurs" (unless that state law is inconsistent with Price-Anderson), 42 U.S.C. § 2014(hh), Congress made clear that Indian tribes have no jurisdiction to legislate regarding such claims and thus have no jurisdiction to adjudicate *any* claims arising from a nuclear incident. *See Strate*, 117 S. Ct. at 1413.

2. *Price-Anderson Gives Defendants the Right to Remove All Claims Arising From a Nuclear Incident to United States District Court*

Congress amended Price-Anderson in 1988 to provide an absolute right of removal of all "public liability actions" from state court to the United States district court in the district where the underlying "nuclear incident" occurred—or to the United States District Court for the District of Columbia, if the nuclear incident occurred outside the United States. 42 U.S.C. § 2210(n)(2).

Removal serves the critical purpose of promoting uniformity and efficiency. Indeed, uniformity is even more important now that all claims arising from a nuclear incident are federal claims. Long ago, this Court recognized "the importance, and even necessity of uniformity of decisions throughout the whole United States" on questions of federal law. *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 347-48 (1816). A right of removal to federal court is "essential" to the "uniform and consistent application of national laws." *Tennessee v. Davis*, 100 U.S. 257, 266 (1880). More than a hundred years ago, this Court rightly held that "the founders of the Constitution could never have intended to leave to the possibly varying decisions of the State Courts what the laws of the government it established are [or] what rights they confer."

Id. Just so, Congress can never have intended to leave to the possibly varying decisions of tribal courts what rights and protections Price-Anderson provides in the event of a nuclear incident.

Authorizing tribal courts to adjudicate federal claims under Price-Anderson, as the Ninth Circuit did *sua sponte* in this case, interferes with Congress' objectives in making claims arising from a nuclear incident federal claims and in providing for the consolidation of all such claims arising from a single incident before a single federal court. Authorizing tribal courts to adjudicate those federal claims would promote disparity of procedure and even substantive law and would cause delay.[9]

C. Price-Anderson Preempts State-Law Claims Otherwise Arising From a Nuclear Incident and Necessarily Preempts Any Similar Tribal-Law Claims

By making any and all claims resulting from a nuclear incident federal claims, Price-Anderson preempts any state-law claims that may previously have existed. *Silkwood*, 464 U.S. at 248 ("If Congress evidences an intent to occupy a given field, any state law falling within that field is pre-empted."); *Roberts v. Florida Power & Light Co.*, 146 F.3d 1305, 1307-08 (11th Cir. 1998) (state tort standards of care are preempted by federal regulatory standards in cases arising from nuclear incidents); *Nieman v. NLO, Inc.*, 108 F.3d 1546, 1552-53 (6th Cir. 1997) (claimant may sue for damages arising from a nuclear incident only under Price-Anderson; "the state law claims cannot stand as separate causes of action"); *O'Conner v. Commonwealth Edison Co.*, 13 F.3d 1090, 1099 (7th Cir. 1994) (state cause of action for injuries arising from a nuclear incident is supplanted by the new federal cause of action); *In re TMI Litig. Cases Consol. II*, 940 F.2d 832, 854 (3d Cir. 1991) ("A claim growing out of any nuclear incident is compensable under the terms of the

---

[9] See further discussion, *infra*, in Section II.

Amendments Act, or it is not compensable at all," because state causes of action for injuries arising from a nuclear incident no longer exist).

Because federal preemption is founded on the Supremacy Clause in the United States Constitution, preemption must apply *a fortiori* to tribal law. *See Washington v. Confederated Tribes of Colville*, 447 U.S. 134, 154 (1980) (tribal sovereignty is "dependent on, and subordinate to, only the Federal Government"). *See also Strate*, 117 S. Ct. at 1416 (tribe's inherent sovereignty does not extend beyond "what is necessary to protect tribal self-government or to control internal relations").[10] As a result, there can be no tribal-law claims related to a nuclear incident for a tribal court to try. Indeed, a rule of law that prevented a federal court from taking charge of a case arising under federal law would deny "the conceded sovereignty of [the federal] government over a subject expressly committed to it." *Tennessee v. Davis*, 100 U.S. at 267.

Even where preemption is not complete (as it is here), state (or tribal) law is preempted to the extent it "stands as an obstacle to the accomplishment of the full purposes and objectives of Congress." *Silkwood*, 464 U.S. at 248. A law permitting tribal courts to exercise jurisdiction over Price-Anderson claims would stand as an obstacle to Congress' purpose in amending Price-Anderson in 1988 because it would subject claimants outside the jurisdiction of the tribal court to different procedures and (as explained in more detail below) potentially different substantive law than claimants within the tribal court's jurisdiction. It would also frustrate Congress' clearly expressed

[10] In *Strate*, the Court held that "[o]pening the Tribal Court" for the "optional use" of an Indian plaintiff was "not necessary to protect tribal self-government," and that requiring the non-Indian defendants to defend in "an unfamiliar court" was "not crucial to protect the political integrity, the economic security or the health or welfare" of the tribe. 117 S. Ct. at 1416.

intent to permit defendants to have Price-Anderson claims decided in a federal court.

II. THE FEDERAL REMEDIAL SCHEME IS INCOMPATIBLE WITH TRIBAL COURT ADJUDICATION

The tribal courts are a relatively recent development in the history of the Indian tribes. Although the tribes have always had their traditional dispute resolution mechanisms, formalized court systems were not introduced until the late Nineteenth Century.[11] In 1883, the Secretary of the Interior authorized the establishment of Courts of Indian Offenses ("CIOs"), which were staffed by Indian judges but operated under the control of the Interior Department. *See* FRANK POMMERSHEIM, BRAID OF FEATHERS 61-64 (1995); DELORIA & LYTLE 114-15. At its zenith, the CIO court system was in operation in approximately two-thirds of the reservations across the country. These courts came to be known as "CFR Courts" because the Bureau of Indian Affairs promulgated regulations governing proceedings in the courts. 25 C.F.R. Part 11 (1998).

[11] There were notable exceptions. The Cherokee Nation has long had a formalized system of government, including a Supreme Court that antedated the Supreme Court of Georgia by 20 years. Blake A. Watson, *The Curious Case of Disappearing Federal Jurisdiction Over Federal Enforcement of Federal Law*, 80 MARQ. L. REV. 531, 549 n.88 (1997). *See Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 6 (1831) (describing Cherokee government institutions, including "a code of laws, civil and criminal" and "courts to expound and apply those laws.") For the most part, however, the tribes relied on informal means to enforce their societal norms, such as mediation by tribe leaders, tribal meetings to develop a consensus, peer pressure and ostracism. *See Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 197 (1978) (disputes usually "handled by social and religious pressure and not by formal judicial processes"); VINE DELORIA, JR. & CLIFFORD M. LYTLE, AMERICAN INDIANS, AMERICAN JUSTICE, 111-13 (1983) (hereafter "DELORIA & LYTLE"); Fredric Brandfon, Comment, *Tradition and Judicial Review in the American Indian Tribal Court System*, 38 UCLA L. REV. 991, 994-97 (1991); Blake A. Watson, *supra*, 80 MARQ. L. REV. at 547-49.

The courts have jurisdiction over civil actions against Indians arising in Indian country; jurisdiction lies against non-Indians only by consent. 25 C.F.R. § 11.103 (1998).

In 1934, Congress passed the Indian Reorganization Act, 48 Stat. 984, which was intended to encourage Indian self-governance and provided for the adoption of tribal constitutions and by-laws. 25 U.S.C. § 476. Since then, many tribes have developed their own judicial systems in place of the old CIO/CFR courts. The number of tribal courts has grown rapidly in recent years.[12] It is important to keep in mind, however, that the mining activities at issue in this case took place in the 1950s and 1960s. The legal landscape was different then. The CIO/CFR courts were dominant. It is doubtful that the mining companies had any reason to believe that they were subjecting themselves to tribal court jurisdiction by undertaking the uranium mining activities that gave rise to these claims 30-40 years later. As noted above, the CIO/CFR courts could assert jurisdiction over non-Indians only by consent. Similarly, a leading treatise stated the general rule to be that, for accidents occurring on the reservation, "tribal court jurisdiction in civil cases is invoked only when the *defendant* is a member of the tribe" in the absence of a contrary "stipulation by the parties." DELORIA & LYTLE 210 (emphasis in original). Professor (now Judge) Canby stated flatly that in a reservation-based civil case, if "the Indian wishes to sue the non-Indian in a tribal court, he cannot do it." William C. Canby, Jr., *Civil Jurisdiction and the Indian Reservation*, 1973 UTAH L. REV. 206, 220. In addition, it appears that the Navajo Tribal Courts did not begin asserting general civil jurisdiction over nonmembers as defendants until the Tribal Code was amended in 1980. *See UNC Resources, Inc. v. Benally*, 518 F. Supp. 1046, 1049 &

[12] *See* Gloria Valencia-Weber, *Tribal Courts: Custom and Innovative Law*, 24 N.M.L. REV. 225, 232-33 & n.23 (1994) (describing rapid growth of tribal court system from 1978 to 1993).

nn.6-7 (D. Ariz. 1981).[13] Under these circumstances, it would disrupt settled expectations to require mining companies like the petitioners to defend in tribal court.

The implications of the Ninth Circuit's decision are equally disturbing in today's legal landscape. There are now more than 150 different tribal courts in operation, as well as 13 remaining CIO/CFR courts.[14] The tribal court systems vary widely in structure, procedure and philosophy. Some tribes, such as the Pueblos and Alaskan native villages, follow traditional procedures in which a tribal leader resolves disputes informally according to customary laws.[15] Other tribes, such as the Navajo, have a well-established court system with a large case load. *See* Gloria Valencia-Weber, *supra* n.12, at 233 n.22.[16]

[13] The only exception before that amendment was apparently a narrow one based on a Navajo Tribal Council resolution allowing jurisdiction over forcible entry and detainer actions. *See* William C. Canby, *supra*, at 223. That exception was not established until 1972, after the mining activities at issue here had been terminated. *Id.*

[14] *See* 25 C.F.R. § 11.100(a) (1998) (listing CIO courts); BUREAU OF INDIAN AFFAIRS, NATIVE AMERICAN TRIBAL COURT PROFILES (1985) (hereafter "TRIBAL COURT PROFILES"); B.J. Jones, *Welcoming Tribal Courts into the Judicial Fraternity*, 24 WM. MITCHELL L. REV. 457, 475-76 (1998).

[15] *See* TRIBAL COURT PROFILES 71, 77, 79, 82, 84, 88, 90, 91, 95; DELORIA & LYTLE 112-13 (describing traditional court system); Robert D. Cooter & Wolfgang Fikentscher, *Indian Common Law: The Role of Custom in American Indian Tribal Courts*, 48 AM. J. COMP. L. 287, 301-02 & n.52 (1998) (describing various types of Pueblo courts); Melissa L. Koehn, *Civil Jurisdiction: The Boundaries Between Federal and Tribal Courts*, 29 ARIZ. ST. L.J. 705, 712 (1997) (discussing secrecy of the traditional Iroquois and Pueblo dispute resolution process); Carey N. Vicenti, *The Reemergence of Tribal Society and Traditional Justice Systems*, 79 JUDICATURE 134, 139-41 (1995) (describing evolution of tribal court processes).

[16] For a discussion by the Navajo Chief Justice of Navajo judicial philosophy and traditional methods of adjudication, *see* James

Most courts fall somewhere in between the extremes. *See generally* Michael Taylor, *Modern Practice in the Indian Courts*, 10 U. PUGET SOUND L. REV. 231 (1987).

The Ninth Circuit's decision suggests that any of the 170 tribal courts is entitled to decide for itself whether it has jurisdiction to hear Price-Anderson claims in the event of a nuclear incident, and then to decide those claims on the merits if it concludes that it has jurisdiction. The Ninth Circuit's analysis is generally applicable and could be cited as a basis for jurisdiction in any tribal court, no matter how well-equipped to handle complex, technical cases.[17] It is also possible that several different tribal courts would have jurisdiction over claims arising out of the same nuclear incident. For example, the Palo Verde nuclear plant in Arizona and the San Onofre nuclear plant in Southern California are surrounded by different tribes. In the event of a nuclear incident, two or more tribal courts might assert jurisdiction over claims arising out of the incident.[18] There would be no method for transferring or consolidating the cases in a single forum—a problem that could be easily solved in the federal courts under 42 U.S.C. § 2210(n)(2), or even under the general federal statutes. *See* 28 U.S.C. §§ 1404,

W. Zion & Robert Yazzie, *Indigenous Law in North America in the Wake of Conquest*, 20 B.C. INT'L & COMP. L. REV. 55 (1997).

[17] *See* Laurie Reynolds, *Adjudication in Indian Country: The Confusing Parameters of State, Federal, and Tribal Jurisdiction*, 38 WM. & MARY L. REV. 539, 568-89 (1997) (describing variation in tribal courts and suitability for adjudication). There is a wide variety in the tribal courts' resources and sophistication, and in the legal training of the tribal judges. *See* TRIBAL COURT PROFILES; Gloria Valencia-Weber, *supra* n.12, at 240-41. The Navajo tribal court judges, for example, are not required to have any formal education beyond high school. *See* 7 Navajo Nation Code § 354(c).

[18] The surrounding tribes presumably would argue that their courts have jurisdiction because the incident had a "direct effect" on the "economic security . . . health [and] welfare of the tribe." *Montana v. United States*, 450 U.S. 544, 566 (1981).

1407. Allowing multiple claims to go forward in different tribal courts would result in delay, increased costs and the real possibility of inconsistent results. This would clearly undermine the congressional policy of ensuring that all liability arising out of a nuclear incident can be determined quickly and efficiently in one case by a single decision-maker.

If the Ninth Circuit is correct, those allegedly responsible for a nuclear incident would be forced to defend Price-Anderson claims in each tribal court where they are sued. The defendant might attempt to remove the cases from the tribal courts to federal court, but that strategy is likely to fail. The general removal statute on its face applies only to civil actions "brought in a State court." 28 U.S.C. § 1441(a). The courts that have considered the matter have generally held that the statute means what it says and that a tribal court is not a "State court." For example, in *Becenti v. Vigil*, 902 F.2d 777, 780-81 (10th Cir. 1990), the Tenth Circuit held that removal was improper, observing that "Congress has not yet seen fit to incorporate tribal court actions such as the one involved here in its grant of removal jurisdiction to the federal district courts."[19] The Price-Anderson removal provision, 42 U.S.C. § 2210(n)(2), likewise applies only to actions "pending in any State court." Thus, there is no statutory basis to remove Price-Anderson claims from the tribal courts.

With no means of removing the cases to federal court, the defendants would be forced to defend in the tribal courts. There is no guarantee that the tribal courts all

[19] *Accord Kerr-McGee Corp. v. Farley*, 115 F.3d 1498, 1505 (10th Cir. 1997), *cert. denied*, 118 S. Ct. 880 (1998); *DeCoteau v. Sentry Ins. Co.*, 915 F. Supp. 155 (D.N.D. 1996); *Weso v. Menominee Indian School Dist.*, 915 F. Supp. 73 (E.D. Wis. 1995). *But see United States v. Tsosie*, 92 F.3d 1037, 1040 (10th Cir. 1996), in which the case apparently had been removed from tribal court without objection. The propriety of removal was not discussed.

would interpret and apply the Price-Anderson Act in the same manner. Indeed, there is no guarantee that the courts would even attempt to apply federal law to the Price-Anderson claims. Tribal-court legal systems do not invariably give precedence to federal law. For example, section 2-111 of the Code of the Winnebago Tribe specifies the hierarchy of laws to be applied in civil actions:

> 1. In all civil actions the tribal court shall apply:
>
> A. The constitution, statutes and common law of the tribe not prohibited by applicable federal law, and if none, then
>
> B. The federal law, including federal common law, and if none, then
>
> C. The laws of any state or other jurisdiction which the courts find to be compatible with the public policy and needs of the tribe.
>
> 2. No federal or state law shall be applied to a civil action pursuant to paragraphs (B) and (C) of subsection (1) of this section if such law is inconsistent with the laws of the tribe or the public policy of the tribe.

See Nell Jessup Newton, *Tribal Court Praxis: One Year in the Life of Twenty Indian Tribal Courts*, 22 AM. INDIAN L. REV. 285, 301 (1998) (quoting and discussing § 2-111). A Winnebago tribal court hearing claims arising out of a nuclear incident could conclude, relying on section 2-111, that tribal law takes precedence over federal cases interpreting the Price-Anderson Act, or even over the provisions of the Act itself.

The Colville Tribe likewise treats its laws as having supremacy over federal law. Section 4.1.11 of the Colville Tribal Code provides: "In all cases the court shall apply, in the following order of priority unless superseded by a specific section of the Law and Order Code, any applicable laws of the Colville Confederated Tribes, tribal case law,

state common law, federal statutes, federal common law and international law." *See* Michael Taylor, *supra*, 10 U. PUGET SOUND L. REV. at 241 n.45 (quoting § 4.1.11). The Sitka tribal courts apply the codes of the Tribe, supplemented by the tribe's customary law. The courts are permitted to refer to federal and state law for "guidance." *See* GloriaValencia-Weber, *supra* n.12, at 253.[20]

These examples simply illustrate that the tribal courts are not likely to apply federal regulatory schemes with the same fidelity and consistency as the federal courts. This is understandable, as each tribe enjoys many of the attributes of an independent, sovereign nation. And the tribal courts undoubtedly have unique competence in applying tribal law to cases within their jurisdiction. But Price-Anderson requires application of federal law, which in turn borrows state law for some issues. The tribal courts have no traditional role or special expertise in applying federal and state law. In implementing a federal statute such as Price-Anderson, it is critical to have predictable, uniform enforcement subject to ultimate review in this Court. Long ago, the Court recognized that in order to achieve "uniformity of decisions throughout

---

[20] *See also* Judith Resnik, *Dependent Sovereigns: Indian Tribes, States, and the Federal Courts*, 56 U. CHI. L. REV. 671, 733 (1989) ("tribal courts may not always follow federal law."). Another potential problem with tribal court adjudication is that the court's judgment may not be given full faith and credit in state and federal courts. *See* 28 U.S.C. § 1738 (full faith and credit due to courts of any "State, Territory or Possession"); *Wilson v. Marchington*, 127 F.3d 805 (9th Cir. 1997) (tribal court judgments not entitled to full faith and credit; enforceable only as a matter of comity), *cert. denied*, 118 S. Ct. 1516 (1998); Robert N. Clinton, *Tribal Courts and the Federal Union*, 26 WILLAMETTE L. REV. 841, 897-921 (1990) (discussing applicability of full faith and credit to tribal court judgments); Robert Laurence, *Full Faith and Credit in Tribal Courts*, 28 N.M.L. REV. 19 (1998) (same). Nationwide enforceability of a judgment is particularly important in implementing a broad federal scheme like the Price-Anderson Act.

the whole United States" on questions of federal law, lower courts must be subject to the control of a single "revising authority" empowered to control any "jarring and discordant judgments, and harmonize them into uniformity." *Hunter's Lessee*, 14 U.S. (1 Wheat.) at 347-48.

The decision below is at odds with these principles in that it divests the federal courts of jurisdiction over claims arising out of a federal statute that preempts the field it occupies. Worse yet, the Ninth Circuit's decision vests jurisdiction in a court system from which there may be no effective recourse. If this case had been filed in state court, petitioners could have ensured a federal forum by removal at the outset of the case or by a certiorari petition to this Court at the conclusion of the state-court proceedings. When a case is filed in tribal court, however, there is no comparable right of recourse to the federal court system. Cases cannot be removed from a tribal court, as discussed above. And there is substantial doubt as to whether tribal-court decisions may be reviewed on the merits in federal court. The federal courts are clearly authorized to review tribal-court decisions determining the jurisdiction of the tribal courts. *See, e.g., Mustang Prod. Co. v. Harrison*, 94 F.3d 1382 (10th Cir. 1996), *cert. denied*, 117 S. Ct. 1288 (1997); *FMC v. Shoshone-Bannock Tribes*, 905 F.2d 1311 (9th Cir. 1990). In some cases, the jurisdictional determination is closely related to the merits. *See, e.g., Enlow v. Moore*, 134 F.3d 993 (10th Cir. 1998) (location of boundary line resolved both jurisdiction and merits). But in principle, the federal courts appear to be limiting their review to the tribal court's jurisdictional determination. *See Enlow*, 134 F.3d at 995 n.3.

If the tribal court does have jurisdiction, there is no obvious means by which its decision could be "appealed" or reviewed on the merits in federal court. This Court has

stated, although perhaps in dicta, that once it is determined that the tribal court has jurisdiction, "proper deference to the tribal court system precludes relitigation of issues raised . . . and resolved in the Tribal Courts." *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9, 19 (1987). *See also Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 65-66 (1978) (implicitly recognizing the absence of any general right to appeal tribal-court decisions to federal courts). There is no apparent statutory basis on which federal courts could review the merits of tribal-court decisions. *See Duncan Energy Co. v. Three Affiliated Tribes*, 27 F.3d 1294, 1302 (8th Cir. 1994) (Loken, J., concurring); *LaBeau v. Dakota*, 815 F. Supp. 1074, 1076 (W.D. Mich. 1993). Nor would such review lie within this Court's certiorari jurisdiction. *See* 28 U.S.C. § 1257. It could be argued that federal courts have the inherent right to review any tribal-court decision construing a federal statute or deciding a federal question. *Cf. Arizona Public Serv. Co. v. Aspaas*, 77 F.3d 1128, 1134 (9th Cir. 1995) (federal courts are "the final arbiters of federal law"). But that principle has yet to be clearly established. Thus, a tribal court decision misinterpreting—or refusing to apply—the Price-Anderson Act might be effectively immune from review and correction in the federal courts.[21]

---

[21] In enacting the Indian Tribal Justice Act, Pub. L. No. 103-176, 25 U.S.C. § 3601 et seq., Congress considered but rejected a provision in the Senate bill that would have required a study of tribal jurisdiction over federal laws. The Conference Committee concluded that "any examination of the possibility of Federal court review of tribal court decisions" would be premature at that time. H. CONF. REP. No. 103-383, at 13, *reprinted in* 1993 U.S.C.C.A.N. 2453, 2457. *See also* Timothy W. Joranko, *Exhaustion of Tribal Remedies in the Lower Courts After National Farmers Union and Iowa Mutual*, 78 MINN. L. REV. 259, 295-305 (1993) (discussing reviewability of tribal-court decisions); Laurie Reynolds, *"Jurisdiction" in Federal Indian Law*, 27 N.M.L. REV. 359, 383-86 (1997) (same).

Amicus does not mean to suggest that the tribal courts are generally incompetent or unreliable. On the contrary, they perform an important function that has been clearly recognized by Congress and the Executive Branch.[22] But the proper role of the tribal courts does not extend to federal legislative schemes of national significance, especially where Congress intended to guarantee a federal forum to adjudicate all claims. Interpreting and applying federal statutes is the primary business of the federal courts. Indian tribal courts can claim no special interest or expertise in administering Price-Anderson or other comparable federal statutes.[23] Nor is jurisdiction over Price-Anderson claims "necessary to protect tribal self-government or to control internal relations." *Strate*, 117 S. Ct. at 1416 (quoting *Montana*, 450 U.S. at 564). The importance of assuring a federal forum for Price-Anderson claims outweighs whatever benefit may be derived from allowing the tribal courts to adjudicate those claims.

The Ninth Circuit's decision in this case is at odds with the congressional purpose of assuring a federal forum to resolve all claims arising out of a nuclear incident. The decision is particularly troublesome because it sets a precedent that is not necessarily limited to Price-Anderson and could be applied to other federal statutes. For example, the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961 *et seq.* ("RICO"), is like Price-Anderson in that it establishes an elaborate federal remedial scheme enforceable in either state or federal court. *See Tafflin v.*

---

[22] *See generally* Janet Reno, *A Federal Commitment to Tribal Justice Systems*, 79 JUDICATURE 113 (1995).

[23] *See* Laurie Reynolds, *Exhaustion of Tribal Remedies: Extolling Tribal Sovereignty While Expanding Federal Jurisdiction*, 73 N.C.L. REV. 1089, 1137-39 (1995) (questioning basis for tribal jurisdiction over federal questions); Brief *Amicus Curiae* for Montana and 13 other states in *Strate v. A-1 Contractors*, (U.S. No. 95-1872), at 21 (arguing that tribal courts lack jurisdiction over federal claims against nonmembers).

Levitt, 493 U.S. 455 (1990). Tribal members claiming to be the victims of racketeering activities by nonmembers might attempt to bring a RICO case against the nonmembers in tribal court. Under the Ninth Circuit's rationale, the tribal court would have jurisdiction to adjudicate the RICO claims. The defendant would have no right to remove, and it would be difficult or impossible to obtain federal court review of the merits of the final judgment.

Other federal statutes could be cited as additional examples of the mischief that the Ninth Circuit's decision may work.[24] So long as the tribal courts remain outside the federal system and potentially insulated from federal court review (including ultimate review in this Court), the tribal courts should not adjudicate federal claims under federal statutes.

---

[24] The state courts have been found to have concurrent jurisdiction to hear claims under many different federal statutes. *See, e.g., Yellow Freight Systems, Inc. v. Donnelly*, 494 U.S. 820 (1990) (Title VII of the Civil Rights Act of 1964); *Maine v. Thiboutot*, 448 U.S. 1 (1980) (civil rights actions under 42 U.S.C. § 1983); *Hapgood v. City of Warren*, 127 F.3d 490, 494 (6th Cir. 1997) (Americans with Disabilities Act); *Aquatherm Indus., Inc. v. Florida Power & Light Co.*, 84 F.3d 1388, 1394 (11th Cir. 1996) (Lanham Act); *Lane v. Central Bank of Alabama, N.A.*, 756 F.2d 814 (11th Cir. 1985) (Bank Holding Company Act). *See generally Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 478 (1981) (state courts presumed to enjoy concurrent jurisdiction over federal statutes).

CONCLUSION

The judgment of the Ninth Circuit should be reversed.

Respectfully submitted,

Of Counsel:
HAROLD P. QUINN, JR.
KATIE SWEENEY
NATIONAL MINING ASSOCIATION
1130 17th Street, N.W.
Washington, D.C. 20036

December 8, 1998

JAMES B. HAMLIN
(Counsel of Record)
ANTHONY J. THOMPSON
EDWARD C. SCHWEITZER, JR.
SHAW PITTMAN POTTS & TROWBRIDGE
2300 N Street, N.W.
Washington, D.C. 20037
(202) 663-8000
Attorneys for *Amicus Curiae*

Supreme Court, U.S.
FILED
DEC 8 1998
CLERK

No. 98-6

IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

EL PASO NATURAL GAS COMPANY,
CYPRUS FOOTE MINERAL COMPANY,
AND CYPRUS AMAX MINERALS COMPANY,
Petitioners,

v.

LAURA NEZTSOSIE; ARLINDA NEZTSOSIE; AND ZONNIE MARIE DANDY RICHARDS, INDIVIDUALLY AND AS REPRESENTATIVE OF THE ESTATE OF HAROLD J. RICHARDS, SR.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF *AMICUS CURIAE* OF THE ASSOCIATION OF AMERICAN RAILROADS IN SUPPORT OF PETITIONERS

Of Counsel:
LOUIS WARCHOT
DANIEL SAPHIRE
ASSOCIATION OF AMERICAN RAILROADS
50 F Street, N.W.
Washington, D.C. 20001
(202) 639-2500

BETTY JO CHRISTIAN
Counsel of Record
CHARLES G. COLE
SARA E. HAUPTFUEHRER
STEPTOE & JOHNSON LLP
1330 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 429-8113
Counsel for Amicus Curiae Association of American Railroads

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

2788

TABLE OF CONTENTS

	Page
INTEREST OF *AMICUS CURIAE*	1
SUMMARY OF ARGUMENT	5
ARGUMENT	7
I. EXHAUSTION OF TRIBAL REMEDIES IS NOT AN UNYIELDING REQUIREMENT	7
A. Exhaustion Analysis Properly Takes Into Account Countervailing Federal Interests	8
B. The Ninth Circuit's Strict View of the Exhaustion Doctrine Is Not Supported by This Court's Precedents	12
II. FEDERAL COURTS SHOULD CONSIDER CLAIMS OF IMPLIED PREEMPTION OF TRIBAL COURT JURISDICTION WITHOUT REQUIRING EXHAUSTION	15
A. Federal Regulatory Preemption May Deprive Tribal Courts of Jurisdiction	16
B. Federal Courts Should Determine Implied Preemption Issues Without Requiring Exhaustion of Tribal Court Remedies	19
CONCLUSION	23

TABLE OF AUTHORITIES

CASES — Page

Burlington Northern R.R. v. Crow Tribal Council, 940 F.2d 1239 (9th Cir. 1991) 4, 8
Burlington Northern R.R. v. Minnesota, 882 F.2d 1349 (8th Cir. 1989) 22
Burlington Northern R.R. v. Montana, 880 F.2d 1104 (9th Cir. 1989) 22
Burlington Northern R.R. v. Oklahoma Tax Comm'n, 481 U.S. 454 (1987) 2
Burlington Northern R.R. v. Red Wolf, 106 F.3d 868 (9th Cir. 1996), *cert. granted & decision vacated*, 118 S. Ct. 37 (1997) 3
California Fed. Savs. & Loan Ass'n v. Guerra, 479 U.S. 2772 (1987) 18
Cohens v. Virginia, 19 U.S. (6 Wheat.) 264 (1921) 9
Colorado River Water Conservation Dist. v. United States, 424 U.S. 800 (1976) 5, 8-10
County of Allegheny v. Frank Mashuda Co., 360 U.S. 185 (1959) 9
Department of Revenue of Oregon v. ACF Industries, Inc., 510 U.S. 332 (1994) 3-4
Hines v. Davidowitz, 312 U.S. 52 (1941) 22
In re TMI Litigation Cases Consolidated II, 940 F.2d 832 (3d Cir. 1991) 2
Iowa Mutual Ins. Co. v. LaPlante, 480 U.S. 9 (1987) ..... *passim*
Kerr-McGee Corp. v. Farley, 115 F.3d 1498 (10th Cir. 1997), *cert. denied*, 118 S. Ct. 880 (1998) 8
Massachusetts Mutual Life Ins. Co. v. Russell, 473 U.S. 134 (1985) 17
McCarthy v. Madigan, 503 U.S. 140 (1992) 11
Missouri Pac. R.R. v. Railroad Comm'n of Texas, 850 F.2d 264 (5th Cir. 1988) 22
Montana v. United States, 450 U.S. 544 (1981) 6, 14-15, 16-17
Moses H. Cone Memorial Hosp. Co. v. Mercury Constr. Co., 460 U.S. 1 (1983) 9

TABLE OF AUTHORITIES—Continued

Page

National Farmers Union Ins. Cos. v. Crow Tribe, 471 U.S. 845 (1985) ..... *passim*
Nieman v. NLO, Inc., 108 F.3d 1546 (6th Cir. 1997) 2
O'Conner v. Commonwealth Edison Co., 13 F.3d 1090 (7th Cir. 1994) 2
Oliphant v. Suquamish Indian Tribe, 435 U.S. U.S. 191 (1978) 18
Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Comm'n, 461 U.S. 190 (1983) 18
Pennsylvania R.R. v. Public Service Comm'n, 250 U.S. 566 (1919) 18
Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41 (1987) 17
Ray v. Atlantic Richfield Co., 435 U.S. 151 (1978) 21-22
Reservation Tel. Coop. v. Three Affiliated Tribes of the Fort Berthold Reservation, 76 F.3d 181 (8th Cir. 1996) 8
Rice v. Santa Fe Elevator Corp., 331 U.S. 218 (1947) 18
Schneidewind v. ANR Pipeline Co., 485 U.S. 293 (1988) 21
South Dakota v. Bourland, 508 U.S. 679 (1993) 6, 17
Strate v. A-1 Contractors, 520 U.S. 438 (1997) ..... *passim*
United States v. Wheeler, 435 U.S. 313 (1978) 16
Western Air Lines, Inc. v. Board of Equalization of South Dakota, 480 U.S. 123 (1987) 4

STATUTES

25 U.S.C. §§ 323-28 13-14
42 U.S.C. § 2210(n)(2) 2
49 U.S.C.A. § 10501 ..... 4, 22
49 U.S.C. § 10903 4
49 U.S.C. §§ 20101-20153 22
49 U.S.C. § 20106 5
49 U.S.C. § 20142 4

TABLE OF AUTHORITIES—Continued

CODE OF FEDERAL REGULATIONS	Page
49 C.F.R. §§ 213.31-.37	4
49 C.F.R. §§ 213.51-63	4
49 C.F.R. §§ 213.101-143	4
49 C.F.R. §§ 240.1-411	4
MISCELLANEOUS	
Bernard Schwartz, ADMINISTRATIVE LAW 542 (3d ed. 1991)	11
Black's Law Dictionary 266 (5th ed. 1998)	10
Laurie Reynolds, *Exhaustion of Tribal Remedies: Extolling Tribal Sovereignty While Expanding Federal Jurisdiction*, 73 N.C. L. Rev. 1089 (1995)	20
RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 101, 403(3) (1987)	10

IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

No. 98-6

EL PASO NATURAL GAS COMPANY,
CYPRUS FOOTE MINERAL COMPANY,
AND CYPRUS AMAX MINERALS COMPANY,
Petitioners,

v.

LAURA NEZTSOSIE; ARLINDA NEZTSOSIE; AND ZONNIE MARIE DANDY RICHARDS, INDIVIDUALLY AND AS REPRESENTATIVE OF THE ESTATE OF HAROLD J. RICHARDS, SR.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF *AMICUS CURIAE* OF THE ASSOCIATION OF AMERICAN RAILROADS IN SUPPORT OF PETITIONERS

INTEREST OF *AMICUS CURIAE* [1]

The Association of American Railroads ("AAR") is a trade association representing major railroads in the United States. Its members account for approximately 77

[1] No person or entity other than the AAR, certain of its members and counsel have made monetary contributions toward this brief, and no counsel for any party played any role in the preparation of any part of the brief. AAR has filed with the Clerk of the Court the consent of counsel for Petitioners and Respondents to file this brief.

percent of the line haulage, employ 91 percent of the workers, and produce approximately 93 percent of the freight revenues of all railroads in the United States. AAR represents its member railroads before courts, agencies, and the Congress in matters of common concern. It has previously filed *amicus curiae* briefs in cases before this Court that present issues of substantial importance to its members.[2] In the 1997 Term, AAR urged this Court to accept for review a petition presenting one of the issues presented by this case.[3]

The Petitioners here, successors to operators of uranium mines located on the Navajo Reservation, were sued in tribal court by members of the Navajo Nation alleging injury caused by exposure to radioactive wastes. The Atomic Energy Act, as amended, broadly regulates the field of nuclear power.[4] The Act also creates a federal cause of action and gives defendants the absolute right to have such claims adjudicated in federal court by mandating removal from state court at the defendant's request. 42 U.S.C. § 2210(n)(2). Despite these features of the statutory scheme, the Ninth Circuit ordered Petitioners to exhaust tribal remedies before challenging tribal jurisdiction in federal court on the ground of federal preemption.

---

[2] *See Burlington Northern R.R. v. Blackfeet Tribe of the Blackfeet Indian Reservation*, No. 91-545 (filed Nov. 1, 1991); *Southern Pacific Transportation Co. v. Jose Hernandez*, No. 91-293 (filed Sept. 18, 1991); *Transportes Aeros Mercantiles Pan Americanos, S.A. v. International Association of Machinists & Aerospace Workers*, No. 91-02 (filed Aug. 30, 1991); *Norfolk & Western Ry. v. Olen Roberson*, No. 90-1271 (filed Apr. 19, 1991); *Burlington Northern R.R. v. Oklahoma Tax Comm'n*, 481 U.S. 454 (1987).

[3] *See* Brief *Amicus Curiae* of the Association of American Railroads in Support of the Petition, *Kerr-McGee Corp. v. Farley*, No. 97-705 (filed Dec. 22, 1997).

[4] *See, e.g., Nieman v. NLO, Inc.*, 108 F.3d 1546, 1553 (6th Cir. 1997); *O'Conner v. Commonwealth Edison Co.*, 13 F.3d 1090, 1099 (7th Cir. 1994); *In re TMI Litigation Cases Consolidated II*, 940 F.2d 832, 854 (3d Cir. 1991).

AAR has a strong interest in this case because the Ninth Circuit's decision, though addressing a dispute involving nuclear power, has serious implications for the nation's railroads. That decision applies the doctrine of exhaustion of tribal remedies inflexibly, requiring resort to tribal courts even when the controlling issue is whether a scheme of federal regulation displaces tribal adjudicatory power. Like the nuclear power industry, railroads are subject to comprehensive federal regulation which displaces tribal authority to regulate their operations. The Ninth Circuit's misguided extension of this Court's prior precedents will subject the railroads to time-consuming, burdensome and needless litigation in the tribal courts.

The impact of the court of appeals' "strict view" of exhaustion doctrine is striking. While the litigation is pending, the entity subject to federal regulation typically is exposed to local (*i.e.* tribal) regulation. This is precisely the danger against which federal preemption doctrine was designed to protect. The regulated entity also incurs the cost of litigating the case on its merits, despite the possibility, indeed in many cases the likelihood, that the entire proceeding may ultimately be found void by a federal court. And it runs the risk of a huge verdict at the hands of a jury composed solely of tribal members. *See, e.g., Burlington Northern Railroad v. Red Wolf*, 106 F.3d 868, 869 (9th Cir. 1996) (requiring exhaustion of tribal remedies following $250 million tribal jury verdict arising from grade crossing accident), *cert. granted & decision vacated*, 118 S. Ct. 37 (1997). It is little consolation to those who have suffered these costs that the tribal court judgment may ultimately be set aside as void for lack of jurisdiction, since they then face the prospect of the litigation beginning anew in another forum.

The operational and legal risks associated with a denial of access to the federal courts are particularly severe for the nation's railroads. Railroads are tempting targets for tribal regulation, taxation, and civil liability claims.[5]

---

[5] As this Court noted in *Department of Revenue of Oregon v. ACF Industries, Inc.*, 510 U.S. 332, 336 (1994), railroads " 'are

Pursuant to federal rights of way, one or more railroads cross the lands of at least 55 reservations in 16 states. This century-old configuration is not likely to change, since a large number of rights of way carry main rail lines that cannot be abandoned.

AAR members have already seen a number of attempts by tribes to engage in improper regulation of their operations on reservation lands. For example, *Burlington Northern R.R. v. Crow Tribal Council*, 940 F.2d 1239 (9th Cir. 1991), dealt with a Crow Tribal Common Carrier Ordinance adopted in 1982 which estabilshed "general duties" of "railroad lines" operating on the tribe's reservation. It authorized tribal regulation of health and safety, service and facilities, and abandonment, all of which are addressed by federal regulatory law.[6] *Id.* at 1241. In 1996, the Bad River Band of the Lake Superior Tribe of Chippewa Indians enacted a "Railroad Safety Ordinance." This ordinance purported to regulate, among other things, the track to be used on reservation lands and the "qualifications" of railroad personnel on trains crossing the reservation, notwithstanding that the Federal Railway Safety Act ("FRSA") and regulations promulgated thereunder regulate track safety and operation[7] and the "licensing or certification" of locomotive engineers.[8]

---

easy prey for State and local tax assessors' in that they are 'nonvoting, often nonresident, targets for local taxation,' who cannot easily remove themselves from the locality." (Quoting *Western Air Lines, Inc. v. Board of Equalization of South Dakota*, 480 U.S. 123, 131 (1987).).

[6] *See* 49 U.S.C. § 20142 (safety); § 10501(b)(1) (service and facilities); § 10903 (abandonment).

[7] *See* 49 U.S.C. § 20142; 49 C.F.R. §§ 213.31-.37 (track roadbeds), 213.51-.63 (track geometry), 213.101-.143 (track structure).

[8] *See* 49 C.F.R. §§ 240.1-.411 (1997).

These examples of tribal efforts to regulate railroads underscore the seriousness of this issue for the railroad industry. Tribal regulation—like state and local regulation—contravenes the congressional policy calling for "national uniformity" in the regulation of railroads.[9] Railroads need speedy, unimpeded access to federal courts to determine the scope of federal preemption and the consequent limitations on tribal jurisdiction.

SUMMARY OF ARGUMENT

The Ninth Circuit held that a federal court presented with a challenge to tribal court jurisdiction may consider in the first instance claims of federal preemption only where a federal statute expressly forbids tribal court jurisdiction. In reaching that result, the court failed to accord any weight to countervailing interests favoring the immediate exercise of jurisdiction by the federal courts with respect to issues of federal preemption.

This mechanical approach ignores the underpinnings of the tribal exhaustion doctrine. Exhaustion, this Court explained in *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9 (1987), is based on comity, and is "analogous to principles of abstention articulated in *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976)." 480 U.S. at 16 n.8. Flexibility is a defining characteristic of *Colorado River* abstention and comity analysis. These doctrines permit courts to weigh the interest in having a federal court render a prompt decision on an issue of federal law, such as preemption by a comprehensive regulatory scheme. They also permit courts to consider the interest in avoiding piecemeal litigation, so that the parties are not forced to shuttle from court to court in order to get a definitive answer. This Court's prior decisions do not preclude a federal court from initially addressing preemption by a federal regulatory statute.

---

[9] 49 U.S.C. § 20106.

Issues of preemption—whether express or implied—may have a direct impact on the scope of tribal court jurisdiction. In *Strate v. A-1 Contractors*, 520 U.S. 438 (1997), this Court reiterated that, as a "general proposition," the inherent sovereignty of the Indian tribes does not "extend to the activities of nonmembers of the tribe." 520 U.S. at 445-46; *accord Montana v. United States*, 450 U.S. 544, 565 (1981). Rather, such powers lie only to the extent they have been affirmatively granted by Congress.[10] Since tribal adjudicatory jurisdiction reaches no further than its regulatory jurisdiction, *Strate*, 520 U.S. at 453, tribal court jurisdiction does not extend to matters over which the tribe lacks regulatory power as a result of federal preemption.

Federal preemption may be implied as well as express. In either case, there are sound reasons to permit a federal court to consider such claims. For example, in *Strate*, this Court unanimously directed federal courts to consider claims that tribal courts lacked jurisdiction with respect to incidents occurring on rights of way granted by federal statute. In that instance, there is no express prohibition on tribal court jurisdiction, but the relevant questions of statutory interpretation can be readily addressed by the federal courts. Thus, the Court concluded that "the otherwise applicable exhaustion requirement . . . must give way, for it would serve no purpose other than delay." 520 U.S. at 459 n.14.

The policies on which this Court's exhaustion precedents rest—the benefits of permitting tribal courts to

[10] *See Strate*, 520 U.S. at 445 ("[A]bsent express authorization by federal statute or treaty, tribal jurisdiction over the conduct of nonmembers exists only in limited circumstances."); *Montana*, 450 U.S. at 564 (tribal jurisdiction over nonmembers "cannot survive without express congressional delegation"); *South Dakota v. Bourland*, 508 U.S. 679, 695 n.15 (1993) (argument that tribes may exercise jurisdiction over nonmembers "shuts both eyes to the reality that after *Montana*, tribal sovereignty over nonmembers 'cannot survive without express congressional delegation' ").

examine and document the basis in tribal law for their own jurisdiction—do not support exhaustion where a regulated entity raises a preemption claim based on a comprehensive federal scheme. In these cases, the dispositive issue will finally turn on a federal court's interpretation of the scope of federal law and not on any interpretation of tribal law. Yet litigants required to try and appeal such cases in the tribal court system will be forced to incur unnecessary regulatory and litigation costs, as well as delay, before obtaining an authoritative resolution in federal court.

The interpretation of this Court's precedents adopted by the Ninth Circuit and other courts over the last decade is misguided. It has resulted in an overt refusal to consider, let alone properly balance, the substantial countervailing federal interests inherent in federal regulation of specific industries. This Court should hold that the federal courts must address issues of federal preemption without requiring that tribal remedies first be exhausted.

ARGUMENT

I. EXHAUSTION OF TRIBAL REMEDIES IS NOT AN UNYIELDING REQUIREMENT

In the decision below, the Ninth Circuit insisted that exhaustion was required in the absence of an express jurisdictional prohibition in a federal statute or treaty. "Price-Anderson," the court found, "contains no such express prohibition of tribal court jurisdiction." Pet. App. at 13a. The court of appeals then ordered exhaustion of tribal remedies without even considering the countervailing federal interests in bringing order and uniformity to the area of nuclear torts. *See* Pet. App. at 17a-19a. In another recent case involving the same regulatory scheme, the Tenth Circuit, having similarly failed to find an express prohibition of tribal jurisdiction, refused to take such federal interests into account. The Tenth Circuit stated affirmatively that the "*National Farmers* framework

does not accord countervailing federal concerns a place in the comity analysis." *Kerr-McGee Corp. v. Farley*, 115 F.3d 1498, 1508 (10th Cir. 1997), *cert. denied*, 118 S. Ct. 880 (1998).[11] This mechanistic approach to exhaustion analysis lacks support in either the genesis of the exhaustion doctrine or this Court's precedents.

A. Exhaustion Analysis Properly Takes Into Account Countervailing Federal Interests

The doctrine of exhaustion of tribal remedies, as articulated by this Court in *National Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845 (1985), and *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9 (1987), owes its origins to preexisting prudential concerns that have traditionally guided the federal courts in exercising their jurisdiction. As the Court explained in *Iowa Mutual*, "Exhaustion is required as a matter of comity, not as a jurisdictional prerequisite. In this respect, the rule is analogous to principles of abstention articulated in *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976)." 480 U.S. at 16 n.8.

Colorado River abstention is a flexible concept requiring a balancing of interests. It allocates responsibility for initial adjudication on the basis of both the expertise and role of a particular court system and an overall interest in efficiency. In *Colorado River*, the Court began with the premise that "[a]bstention from the exercise of federal jurisdiction is the exception, not the rule." *Colorado*

[11] Other courts have also required exhaustion of tribal remedies even when a federal regulatory scheme strongly implies that federal jurisdiction is exclusive. *See, e.g., Reservation Tel. Coop. v. Three Affiliated Tribes of the Fort Berthold Reservation*, 76 F.3d 181, 185-86 (8th Cir. 1996) (exhaustion mandatory because federal statute apparently preempting tribal tax on telephone lines on reservation did not expressly divest tribal court of jurisdiction); *Burlington Northern R.R. v. Crow Tribal Council*, 940 F.2d 1239, 1245 (9th Cir. 1991) ("exhaustion of tribal remedies is not discretionary; it is mandatory").

River, 424 U.S. at 813. In light of the "virtually unflagging obligation of the federal courts to exercise the jurisdiction given them," *id.* at 817, "[a]bdication of the obligation to decide cases can be justified under this doctrine only in the exceptional circumstances where the order to the parties to repair to the State court would clearly serve an important countervailing interest." *Id.* at 813 (quoting *County of Allegheny v. Frank Mashuda Co.*, 360 U.S. 185, 188-89 (1959)); *see also Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1921) ("We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution.").

The Court then identified some of the specific circumstances in which abstention had been viewed as appropriate, such as where "a federal constitutional issue might be mooted or presented in a different posture by a state court determination of pertinent state law," or where a case presented "difficult questions of state law bearing on policy problems of substantial public import." 424 U.S. at 814. The Court recognized that abstention might also be appropriate when justified by "consideration of '[w]ise judicial administration giving regard to conservation of judicial resources and comprehensive disposition of litigation.'" *Id.* at 817 (citation omitted). This kind of abstention comes into play only when duplicative actions, involving the same parties and the same issues, are pending in the federal and state systems.

A number of factors guide application of *Colorado River* abstention, including the importance of avoiding piecemeal litigation, whether the merits of the dispute turn on the resolution of a federal question, and the adequacy of the fora to protect the parties' rights. *Id.* at 818; *Moses H. Cone Memorial Hosp. Co. v. Mercury Constr. Co.*, 460 U.S. 1, 23 (1983). *Colorado River* abstention does not require federal courts to ignore the federal interest in having federal courts decide questions

of federal law. Nor does it require them to ignore the burdens that may be imposed upon litigants by shuffling them between courts. Rather, *Colorado River* requires an intelligent weighing of the interests present in a particular procedural situation.

The analogy to *Colorado River* is particularly significant in the context of a case involving federal preemption issues. Where Congress has enacted legislation that is preemptive of state or local law, it has recognized a federal interest sufficiently important to override state and local autonomy. That federal interest must be taken into account in balancing the need for federal court action.

Comity, the other concept to which the Court has referred as a basis for tribal court exhaustion, is similarly flexible. The very definition of comity implies discretion: "[a] willingness to grant a privilege, not as a matter of right, but out of deference and good will." [12] As between sovereign nations, comity is "the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience and to the rights of its own citizens or of other persons who are under the protection of its laws." RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 101 (1987). Moreover, the forum court must consider its own interests as well as those of the other state in determining whether to exercise jurisdiction. *Id.* § 403(3). Thus, under a traditional comity analysis, the federal interest in having a federal court decide the preemptive scope of federal law is a legitimate factor which should be considered.

Finally, to the extent that the tribal exhaustion doctrine has roots in the concept of exhaustion of administrative

[12] Black's Law Dictionary 266 (5th ed. 1998).

remedies, that doctrine, too, permits a flexible approach. Exhaustion of administrative remedies "protects agency autonomy by allowing the agency the opportunity in the first instance to apply its expertise and correct its own errors"; "aids judicial review by allowing the parties and the agency to develop the facts of the case in the agency proceeding"; and "promotes judicial economy by avoiding needless repetition of administrative and judicial fact-finding, perhaps avoiding the necessity of any judicial involvement." Bernard Schwartz, ADMINISTRATIVE LAW 542 (3d ed. 1991). These purposes are echoed in *National Farmers'* explanation of the purposes of requiring tribal exhaustion. *See* 471 U.S. at 856-57.

But, again, exhaustion of administrative remedies is not required as a matter of course. Rather, in the administrative law context as well, the interests favoring exhaustion are to be weighed against countervailing interests:

> [T]his Court has declined to require exhaustion in some circumstances even where administrative and judicial interests would counsel otherwise. In determining whether exhaustion is required, federal courts must balance the interest of the individual in obtaining prompt access to a federal judicial forum against countervailing institutional interests favoring exhaustion.

McCarthy v. Madigan, 503 U.S. 140, 146 (1992).

It is thus plain that flexibility is an essential characteristic of the various doctrines behind the concept of tribal court exhaustion. These doctrines recognize the obligation of a federal court to accept jurisdiction, declare the boundaries of federal law, and save litigants the expense of unnecessary litigation.

B. The Ninth Circuit's Strict View of the Exhaustion Doctrine Is Not Supported by This Court's Precedents

In fashioning the concept of trial court exhaustion from these pre-existing doctrines, this Court did not adopt an inflexible rule. "[E]xhaustion is not an unyielding requirement." *Strate*, 420 U.S. at 449 n.7. Rather it is a "prudential" doctrine, adopted "in deference to the capacity of tribal courts 'to explain to the parties the precise basis for accepting [or rejecting] jurisdiction.'" *Id.* at 450 (quoting *National Farmers Union*, 471 U.S. at 857). While the Court in its early cases required exhaustion for a determination of the reach of the tribal court under tribal law and applicable federal treaties, none of its precedents have held that a question of federal preemption must be presented first in tribal court. On the contrary, there are substantial indications in this Court's precedents that such issues of federal law are appropriately considered by the federal courts without exhaustion.

The exhaustion doctrine originated in *National Farmers Union*, a personal injury case arising from a motorcycle accident in a school parking lot. The jurisdictional question was whether the tribal court had authority over the school district. Federal preemption was not at issue, as there was no claim that a specific or comprehensive federal regulatory scheme precluded adjudication of the tort case in tribal court. This Court concluded that "considerations of comity" required exhaustion. *See Iowa Mutual*, 480 U.S. at 15 (explaining *National Farmers Union*). These considerations included "tribal self-government and self-determination" and fostering "the orderly administration of justice in the federal court" based on the development of a full record in the tribal court. *National Farmers Union*, 471 U.S. at 856-57. The Court explained that exhaustion would "encourage tribal courts to explain to the parties the precise basis for accepting jurisdiction, and will also provide other courts with the benefit of their expertise in such matters in the event of

further judicial review." *Id.* at 857. Thus, the Court held that, in a "case of this kind," the examination of the scope of tribal sovereignty "should be conducted in the first instance in the Tribal Court itself." *Id.* at 856.

In *Iowa Mutual*, this Court followed much the same analysis in considering whether the federal courts should adjudicate an insurance coverage dispute that was also pending in tribal court. The courts below had dismissed the claims to permit tribal exhaustion. This Court affirmed, but not without first giving extensive consideration to the Petitioners' argument that tribal court jurisdiction was impliedly prohibited by the federal diversity statute. This Court resolved that question of federal law on its merits, holding that "[i]n the absence of any indication that Congress intended the diversity statute to limit the jurisdiction of the tribal courts," the Court would not find a limitation on tribal sovereignty. 480 U.S. at 18. Significantly, the Court did not require that the implied prohibition issue itself be addressed in the first instance by the tribal court.

Most recently, in *Strate* this Court reviewed its exhaustion cases in considerable detail. It reiterated that the analysis is a "'prudential rule' . . . based on comity." 520 U.S. at 448, 453, 449 n.7. It noted that tribal court jurisdiction over non-Indians in criminal cases is "categorically restricted" and hence not subject to exhaustion, but that exhaustion is appropriate in civil matters where "'the existence and extent of a tribal court's jurisdiction will require a careful examination of tribal sovereignty, the extent to which that sovereignty has been altered, divested, or diminished, as well as a detailed study of relevant statutes, Executive Branch policy as embodied in treaties and elsewhere, and administrative or judicial decisions.'" *Id.* at 449 (quoting 471 U.S. at 855-56).

In *Strate* itself, the Court found that where a nonmember of the tribe was proceeding through the reservation on a right-of-way granted by a federal statute, 25

U.S.C. §§ 323-28 (1994), the tribe had lost its "gatekeeping right," 520 U.S. at 455, so that the rights of the nonmember would be governed by the rule of *Montana v. United States*, 450 U.S. 544. "Subject to controlling provisions in treaties and statutes, and the two exceptions identified in *Montana*, the civil authority of Indian tribes and their courts with respect to non-Indian fee lands generally 'does not extend to the activities of nonmembers of the tribe.'" 520 U.S. at 453 (quoting *Montana*, 450 U.S. at 565). The Court examined each of those exceptions and found that neither was satisfied by a tort case against a nonmember arising from an accident on the right-of-way.

Although *Strate* arose after full litigation in the tribal courts, the Court's unanimous opinion dealt in a categorical fashion with the issue of exhaustion in future cases. Where, as in *Strate*, the case arose on a federal right-of-way and it was "plain that no federal grant provides for tribal governance of nonmembers' conduct," then it would be "equally evident that tribal courts lack adjudicatory authority over disputes arising from such conduct." 520 U.S. at 459 n.14. In this situation, "the otherwise applicable exhaustion requirement . . . must give way, for it would serve no purpose other than delay." *Id.* at 459-60 n.14.

Strate thus indicates that when the issue of tribal court jurisdiction turns purely on questions of federal statutory law—the existence of a federal right-of-way and the absence of an express grant of power to the tribe—exhaustion of tribal remedies is not required.[13] There was no

[13] The Ninth Circuit panel responsible for the *El Paso* decision had great difficulty in assimilating the *Strate* decision. Initially, it rigidly concluded that there were only three "exceptions" to the exhaustion doctrine. Pet. App. at 25a. On rehearing, it amended its opinion to add a fourth exception. *Id.* What the panel failed to recognize is that the rule announced in *Strate* was simply another practical application of the flexible doctrine announced in this Court's earlier cases.

need for an individual federal district court to consider tribal interests potentially implicated by the two "exceptions" to the general rule of *Montana*, since the Court had already considered them itself and found them insufficient to justify jurisdiction in a tort case. Because the only questions remaining were purely questions of federal statutory law, the Court found tribal court exhaustion unnecessary and, in fact, harmful.

In summary, neither the antecedents of the tribal exhaustion doctrine nor this Court's precedents support the strict view applied by the court below. A court engaged in analysis of comity should consider the federal interest in obtaining a federal court interpretation of a potentially preemptive federal statute, as well as the interest of a regulated entity in a prompt and efficient resolution of the controversy. At the same time, a federal court should also consider, as this Court did in *Strate*, whether prior consideration by a tribal court would add anything except delay to analysis of the federal question.

II. FEDERAL COURTS SHOULD CONSIDER CLAIMS OF IMPLIED PREEMPTION OF TRIBAL COURT JURISDICTION WITHOUT REQUIRING EXHAUSTION

Under a flexible exhaustion analysis, the scope of initial federal court review cannot be limited to situations in which there is an express jurisdictional prohibition. Federal law may deprive tribal courts of jurisdiction through regulatory preemption as well as express jurisdictional limitation. Such preemption may take any one of a number of forms: comprehensive federal regulation occupying the field, a federal statute specifying an exclusive remedy, or a federal statutory scheme implicitly creating a conflict with local regulation. In any of these circumstances, tribal courts will lack jurisdiction over nonmembers. Moreover, in each of these circumstances, the question of tribal court jurisdiction will turn on the scope of a federal statute

that has nothing to do with Indian affairs. Thus, whether the preemption is explicit or implicit, the policies favoring a prompt federal decision on the scope of federal preemption will be equally strong, and will be compelling in relation to any reasons for exhaustion of tribal court remedies.

A. Federal Regulatory Preemption May Deprive Tribal Courts of Jurisdiction

In insisting on an express jurisdictional limitation, the court below failed to appreciate the impact of federal preemption on the scope of tribal court jurisdiction. Where a federal statutory scheme—whether through its express provisions or its implied effect—preempts tribal regulation, it also deprives the tribal courts of the power to adjudicate the rights of nonmembers. Thus, tribal court jurisdiction will often turn on a precise analysis of the scope of a federal scheme.

A starting point for any determination of the scope of tribal court jurisdiction over a nonmember is the presumption declared in *Montana* and reaffirmed in *Strate*: "In the main, . . . 'the inherent sovereign powers of an Indian tribe' . . . 'do not extend to the activities of nonmembers of the tribe.'" *Strate*, 520 U.S. at 445-46 (citations omitted); *Montana*, 450 U.S. at 565. This limitation "'rest[s] on the fact that the dependent status of Indian tribes within our territorial jurisdiction is necessarily inconsistent with their freedom independently *to determine their external relations*.'" *Montana*, 450 U.S. at 564 (quoting *United States v. Wheeler*, 435 U.S. 313, 326 (1978) (alteration in original)). The "exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation." *Id.* Thus, Indian tribes have been implicitly divested of their

sovereignty in areas "involving *the relations between an Indian tribe and nonmembers of the tribe.*" *Id.* (citation omitted; emphasis in original).

This presumption may be overcome in limited circumstances. When a tribe owns the land and has retained a landowner's "gatekeeping right" to control entry onto the land, that tribe "retain[s] considerable control over nonmember conduct." *Strate*, 520 U.S. at 454. But if the tribe no longer owns the land or, as in *Strate*, has otherwise given up a landowner's power to exclude nonmembers from the land, the tribe ordinarily will have no basis for regulating the conduct of a nonmember. *Strate*, 520 U.S. at 453; *Bourland*, 508 U.S. at 689, 691 n.11.

Where the tribe has no power to regulate the conduct of a nonmember, it also lacks authority to bring that nonmember before a tribal court to adjudicate claims against him. This is a central holding of *Strate*. "As to nonmembers, we hold, a tribe's adjudicative jurisdiction does not exceed its legislative jurisdiction." 520 U.S. at 453. The Court emphasized, "Absent congressional direction enlarging tribal-court jurisdiction, we adhere to that understanding." *Id.* Thus, in that case, because the Tribes had surrendered their power to regulate conduct on the federally granted right-of-way, they had also lost the power to adjudicate claims against nonmembers arising from their conduct on the right-of-way.

This removal of the Tribes' regulatory power occurred, not by express jurisdictional prohibition, but by implication from a federal statute depriving the Tribes of their power to regulate. And a tribe may also lose its power to regulate, for example, as a result of a federal regulatory scheme that provides an exclusive remedy,[14] occupies

[14] *See, e.g., Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 43-47 (1987) (complexity of statutory scheme confirms that Congress intended remedies provided in Employee Retirement Income Security Act of 1974 to be exclusive); *Massachusetts Mutual Life Ins. Co. v. Russell*, 473 U.S. 134, 147 (1985) (same).

the field,[15] or creates a practical conflict with local tribal law.[16]

In fact, this Court has held that tribal jurisdiction may be removed by implication. In *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978), this Court determined that tribal courts lack jurisdiction to try non-Indians for criminal offenses, despite the absence of an express prohibition:

> While Congress never expressly forbade Indian tribes to impose criminal penalties on non-Indians, we now make express our implicit conclusion of nearly a century ago that Congress consistently believed this to be the necessary result of its repeated legislative actions.

435 U.S. at 204; *see also National Farmers Union*, 471 U.S. at 854-55 (*Oliphant* held that "federal legislation conferring jurisdiction on the federal courts to try non-Indians for offenses committed in Indian Country had *implicitly pre-empted* tribal jurisdiction") (emphasis added).

Whether federal law removes tribal regulatory power through explicit or implicit preemption, the effect on tribal court jurisdiction should be the same. The absence of regulatory jurisdiction over a nonmember necessarily must result in the absence of adjudicatory power. Thus, in a case where federal preemption is asserted, the pivotal question is not the scope of the tribe's jurisdiction under

---

[15] *See, e.g., California Fed. Savs. & Loan Ass'n v. Guerra*, 479 U.S. 272, 280-81 (1987) ("[C]ongressional intent to pre-empt state law in a particular area may be inferred where the scheme of federal regulation is sufficiently comprehensive to make reasonable the inference that Congress 'left no room' for supplementary state regulation.") (citation omitted); *Pennsylvania R.R. v. Public Service Comm'n*, 250 U.S. 566, 568 (1919).

[16] *See, e.g., Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Comm'n*, 461 U.S. 190, 203-04 (1983); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

its constitution, laws and treaties, but rather the interpretation of federal law.

B. Federal Courts Should Determine Implied Preemption Issues Without Requiring Exhaustion of Tribal Court Remedies

As footnote 14 of the *Strate* opinion illustrates, federal courts need not limit their role in determining tribal court jurisdiction to cases of express prohibition. Where there is a viable claim that a federal statute preempts tribal regulatory power, the policies favoring an immediate decision outweigh the interests in tribal court exhaustion. In fact, the same factors that support tribal court exhaustion in the context of a personal injury or contract case, like *National Farmers Union* or *Iowa Mutual*, argue for a prompt and definitive federal court decision in the context of a challenge based on federal regulatory preemption.

In that circumstance, it is not the *tribe's* asserted basis for jurisdiction that is in issue, but rather the scope of the *federal* scheme—the intent of Congress—that is dispositive. The provisions of these federal regulatory schemes are routinely addressed by federal courts, whereas tribal courts encounter them infrequently, if at all. Moreover, as the case before the Court demonstrates, analysis of a claim of implied preemption of tribal court jurisdiction calls for an analysis of a federal statute and Congress's intent, rather than tribal law, and rarely requires an extensive factual record. If the federal scheme fully occupies the field or specifies an exclusive remedy, "the precise basis" for tribal court jurisdiction will be largely irrelevant. Thus, the federal policies that underlay this Court's prior decisions are not served by requiring exhaustion where preemption is asserted.

Nor is referral of such matters to tribal courts consistent with the orderly administration of justice. It makes no sense that, while the federal courts may assume jurisdic-

tion immediately to hear claims of express prohibition of tribal jurisdiction, they should withhold their expertise resolving claims of implied preemption until after full adjudication on the merits in tribal court. Moreover, requiring exhaustion in these circumstances forces litigants to shuffle between tribal and federal courts: first to federal court to determine whether there is an express prohibition, then (if the court rules there is not) to tribal court to consider whether there is an implied prohibition, then back to federal court for a definitive ruling. Such a scheme is hugely wasteful of the resources of both court systems, as well as the time and assets of the litigants. The approach of the court below to preemption is *dis*orderly—a formula for unending, multi-court litigation.

Even the policies supporting tribal autonomy are implicated to a lesser degree when the decisive questions are the scope and intent of a federal regulatory scheme rather than identification of the limits of tribal sovereignty. Those questions are issues on which federal courts will obviously have the last word. A dry run of these issues in tribal court seems pointless and ultimately corrosive of true tribal court autonomy.[17]

If the pertinent federal policies are candidly assessed, it is difficult to see why issues of express prohibition of tribal court jurisdiction should be heard immediately by federal courts, while questions of implied preemption should be deferred until after tribal adjudication on the

[17] As one commentator explained:

> [A]llowing the tribal court to take "first crack" at issues that involve no question of tribal law serves no policy of the exhaustion doctrine . . . . Though interpretation of state and federal law is certainly within the purview of tribal court jurisdiction, the tribal court can claim no particular or unique expertise in these areas.

Laurie Reynolds, *Exhaustion of Tribal Remedies: Extolling Tribal Sovereignty While Expanding Federal Jurisdiction*, 73 N.C. L. Rev. 1089, 1139 (1995).

merits. In either case, it is the federal court's assessment of the scope of federal preemption that will be determinative of the outcome. If the issues are somewhat more subtle in a case of implied preemption, this is a sound reason to draw on the experience and expertise of the federal court. Moreover, in contrast to statutes that specifically prohibit tribal court jurisdiction, comprehensive federal schemes are not likely to be rooted in the history of federal-tribal relations, but rather in the history of federal regulation of a particular industry or field. Thus, there is no reasonable basis in the policies underlying abstention for holding that federal courts can immediately consider claims of express prohibition, but must defer on claims of implied preemption.

An inflexible exhaustion requirement undermines the legitimate interests of nonmembers arising under federal law. Where the dispositive ruling ultimately will come from the federal courts on an issue of federal law, it is burdensome for nonmembers to be forced to litigate the case to finality in the tribal courts before seeking a dispositive federal ruling. With federally-regulated entities, such as railroads, the impact of a court's refusal to entertain a valid federal question pending resolution in tribal court may be inconsistent with the congressional intent underlying the federal scheme at issue. Congress's purpose in broad, preemptive regulation is usually to promote uniformity and consistency in areas in which Congress perceives an important federal interest.[18] The inflexible application of exhaustion of tribal remedies, notwithstanding a colorable preemption claim, ignores these federal

[18] *See, e.g., Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 299-302 (1988) (Natural Gas Act of 1988 reflects Congress' intent to create a "comprehensive scheme of federal regulation" in natural gas industry); *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 163 (1978) (under Ports and Waterways Safety Act of 1972 "Congress intended [to establish] uniform national standards for design and

interests and undermines the uniformity and consistency those statutes are meant to promote.

The nation's railroads are particularly concerned with the lower courts' refusal to consider countervailing interests in exhaustion analysis. Tribal regulation of the safety of railroad operations raises obvious preemption issues under the Federal Railroad Safety Act ("FRSA"), as amended. 49 U.S.C. §§ 20101-20153 (1994). Section 20106 of the FRSA expressly preempts state regulation of areas regulated federally, and the federal courts have given a broad interpretation to the scope of such preemption.[19] Because of the context in which it was written, however, this statute does not expressly refer to tribal law or jurisdiction. Railroads should not be compelled to adjudicate the merits of tribal enforcement of tribal railroad safety ordinances when the controlling question is the preemptive scope of the federal statute.

Similarly, the ICC Termination Act of 1995 ("ICCTA") vests "exclusive jurisdiction" in the Surface Transportation Board over the "services and facilities" of railroads, declares "the remedies provided under" the statute to be "exclusive," and "preempt[s] the remedies provided under Federal or State law." 49 U.S.C.A. § 10501 (b)(2) (1997). While this statute does not expressly

construction" of tanker vessels); *Hines v. Davidowitz*, 312 U.S. 52, 61 (1941) (federal interest in foreign affairs and uniform naturalization preempted Pennsylvania statute requiring registration of alien residents in the state).

[19] *See, e.g., Burlington Northern R.R. v. Minnesota*, 882 F.2d 1349, 1353 (8th Cir. 1989) (FRSA preempts state caboose law since regulations promulgated under that statute permit "the use of end-of-train telemetry devices as substitutes for visual brakes inspection"); *Burlington Northern R.R. v. Montana*, 880 F.2d 1104, 1106 (9th Cir. 1989) (same); *Missouri Pac. R.R. v. Railroad Comm'n of Texas*, 850 F.2d 264, 268 (5th Cir. 1988) ("virtually all state regulations affecting the train itself appear preempted by federal law").

refer to tribes or tribal remedies, its pre-emptive intent is clear. Once again, it would be pointless to spend years litigating the scope of that preemption through several layers of tribal courts when the final answer will be provided by a federal court that has the analytical tools fully available to it. However, the sweeping exhaustion theory followed by the court below—which accords no weight to the federal interests at all—threatens to eliminate any timely opportunity for railroads to seek federal protection from unauthorized and inappropriate tribal regulations.

CONCLUSION

The Court should reverse the decision of the court of appeals and hold that a federal court must address issues of federal preemption, whether express or implied, without requiring that tribal remedies first be exhausted.

Respectfully submitted,

Of Counsel:
LOUIS WARCHOT
DANIEL SAPHIRE
ASSOCIATION OF AMERICAN RAILROADS
50 F Street, N.W.
Washington, D.C. 20001
(202) 639-2500

BETTY JO CHRISTIAN
Counsel of Record
CHARLES G. COLE
SARA E. HAUPTFUEHRER
STEPTOE & JOHNSON LLP
1330 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 429-8113
Counsel for Amicus Curiae Association of American Railroads

Supreme Court, U.S.
FILED
DEC 8 1998
CLERK

No. 98-6

IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

EL PASO NATURAL GAS COMPANY,
CYPRUS FOOTE MINERAL COMPANY,
AND CYPRUS AMAX MINERAL COMPANY,
Petitioners,

v.

LAURA NEZTSOSIE; ARLINDA NEZTSOSIE; and ZONNIE MARIE DANDY RICHARDS, INDIVIDUALLY AND AS REPRESENTATIVE OF THE ESTATE OF HAROLD J. RICHARDS, SR.
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF LEWIS COUNTY, IDAHO, *AMICUS CURIAE*, IN SUPPORT OF PETITIONERS, EL PASO NATURAL GAS COMPANY, ET AL.

MARC A. LYONS
RAMSDEN & LYONS
P.O. Box 1336
700 Ironwood Dr.
Suite 301
Coeur D'Alene, ID 83816
(208) 664-5818

TOM D. TOBIN
TOBIN LAW OFFICES, P.C.
P.O. Box 730
422 Main Street
Winner, SD 57580
(605) 842-2500

KIMRON R. TORGERSON *
Lewis County
Prosecuting Attorney
P.O. Box 398
Nezperce, ID 83543
(208) 937-2271

* *Counsel of Record*

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

8PP

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF *AMICUS CURIAE*	1
ARGUMENT	5
I. THE HISTORY OF THE PRICE-ANDERSON ACT REVEALS THE INCOMPATABILITY BETWEEN TRIBAL COURT JURISDICTION AND THE FEDERAL STATUTORY SCHEME	5
CONCLUSION	6

TABLE OF AUTHORITIES

CASES:	Page
County of Lewis v. Allen and *Nez Perce Tribe*, No. 94-35979, 1998 WL 191233 (9th Cir. Apr. 23, 1998, amended May 5, 1998, and July 24, 1998) (withdrawn)	2, 3, 4, 5
Duncan Energy v. Three Affiliated Tribes, 27 F.3d 1294 (8th Cir. 1994) *cert. denied*, 115 S.Ct. 779 (1995)	2
Duro v. Reina, 495 U.S. 676 (1990)	5
Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978)	5
Reservation Telephone Coopertaive v. Three Affiliated Tribes, 76 F.3d 181 (8th Cir. 1996)	2
Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978)	5
South Dakota v. Bourland, 508 U.S. 679 (1993)	5
Strate v. A-1 Contractors, 117 S.Ct. 1404 (1997)	2, 3, 4, 6
STATUTES:	
Public Law 280, 25 U.S.C. §§ 1321-26	3
Price-Anderson Act, 42 U.S.C. § 2011 *et seq.*	5

IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

No. 98-6

EL PASO NATURAL GAS COMPANY,
CYPRUS FOOTE MINERAL COMPANY,
AND CYPRUS AMAX MINERAL COMPANY,
Petitioners,

v.

LAURA NEZTSOSIE; ARLINDA NEZTSOSIE; and ZONNIE MARIE DANDY RICHARDS, INDIVIDUALLY AND AS REPRESENTATIVE OF THE ESTATE OF HAROLD J. RICHARDS, SR.
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF LEWIS COUNTY, IDAHO, *AMICUS CURIAE*, IN SUPPORT OF PETITIONERS, EL PASO NATURAL GAS COMPANY, ET AL.

INTEREST OF AMICUS CURIAE

1. The primary concern that prompts the filing of this *amicus curiae* brief can be simply stated. Even less than the private-sector, local governmental units confronted with tribal exhaustion issues can ill afford the delay and the additional expenditure of scarce resources that will be occasioned by the Ninth Circuit's expansive and almost mechanical application of a doctrine this Court has recently narrowed (and correctly so). *Strate v. A-1 Con-*

tractors, 117 S.Ct. 1404 (1997). In Lewis County, Idaho, and in other counties similarly situated across the nation, millions of dollars have been squandered in tribal exhaustion litigation in recent years. *See generally Duncan Energy v. Three Affiliated Tribes*, 27 F.3d 1294 (8th Cir. 1994) *cert. denied*, 115 S.Ct. 779 (1995); *Reservation Telephone Cooperative v. Three Affiliated Tribes*, 76 F.3d 181 (8th Cir. 1996). And in most instances, the burdensome delay that has resulted from similarly impractical applications of this doctrine would be intolerable in any other circumstance. For these reasons, Lewis County, Idaho, individually, and as a representative of other counties similarly situated, respectfully submits this *amicus curiae* brief in support of the general proposition that this Court continue to appropriately limit the scope of the tribal exhaustion doctrine, as it did in *Strate*.[1]

2. Lewis County is also currently an appellee before the Ninth Circuit Court of Appeals, in a case that involves general issues of tribal court jurisdiction, *County of Lewis v. Allen and Nez Perce Tribe*, No. 94-35979, 1998 WL 191233 (9th Cir. Apr. 23, 1998, amended May 5, 1998, and July 24, 1998) (withdrawn). Lewis County is a subdivision of the State of Idaho which, through its Sheriff's Department, is responsible for enforcement of state criminal law within county boundaries. Approximately ninety percent of Lewis County is also located within an area claimed by the Nez Perce Indian Tribe as part of the

[1] Lewis County belongs to a local Idaho entity, the North Central Idaho Juridictional Alliance ("NCIJA"). NCIJA is an unincorporated association; its members include three (3) counties, eight (8) cities, three (3) school districts and seven (7) highway districts in north central Idaho whose geographical boundaries include land which was within the Nez Perce Indian Reservation as it existed prior to 1894. The purpose of NCIJA is to provide an organization to foster cooperation between its members and to focus their efforts toward obtaining an adjudication of their jurisdictional authority in relationship to the jurisdictional authority of the United States and the Nez Perce Tribe.

Nez Perce Tribe's Reservation. This same geographic area of Lewis County contains most of the Lewis County residents, of which approximately ninety percent (90%) are not Indian. In addition, ninety percent (90%) of the land in this area is fee land, not owned by the Nez Perce tribe or any tribal member.

In the 1960's, the State of Idaho assumed certain jurisdiction pursuant to Public Law 280 over the conduct of tribal members engaged in state crimes in Indian country. The *Allen* case involves the power of the Nez Perce Tribe to adjudicate tort claims against county law enforcement officers for their actions in enforcing state criminal law, pursuant to this federal authority (if the area is an Indian reservation), or pursuant to otherwise applicable state law (if the area is not an Indian reservation).

The Nez Perce Tribe does not have the authority to regulate the procedural aspects of the Lewis County Sheriff's Department as that Department's officers perform their law enforcement function. Lewis County has a significant and continuing interest in ensuring that civil claims brought against Lewis County law enforcement officers, as a result of the enforcement of state criminal law within the county, be litigated in a neutral forum that will properly safeguard the rights of all parties to the litigation.

The *Allen* case arose out of the arrest of a member of the Nez Perce Tribe (John Allen) by a Lewis County deputy sheriff. Mr. Allen was charged under a state law offense for disturbing the peace. It is undisputed that the sheriff's deputy had the right to be on the fee land in question to investigate the type of complaint at issue. If the fee land is within a continuing reservation, pursuant to Public Law 280, 25 U.S.C. §§ 1321-36, the Nez Perce Tribe has previously consented to the State of Idaho's assumption of concurrent criminal jurisdiction over a number of minor offenses. If the area was not Indian country, it is undisputed that only State law would apply.

Shortly after John Allen was arrested and charged with the crime of disturbing the peace, a state magistrate judge found that probable cause existed to prosecute Mr. Allen on the charge. The charge against Mr. Allen was subsequently dismissed at trial. Mr. Allen then filed suit in the Nez Perce Tribal Court against the deputy sheriff who arrested him, the sheriff, and Lewis County, seeking damages for, among other things, false arrest and malicious prosecution.

Because of the exhaustion doctrine, Lewis County first litigated the question in tribal court. *Over five and one-half years later,* the Nez Perce Tribal Court of Appeals affirmed the tribal decision confirming tribal jurisdiction and the tribal judgment (which included an award of punitive damages, even though the tribal jury had concluded that the arresting officer had acted in good faith).

Having exhausted their tribal court remedies, Lewis County and its law enforcement officers then filed a suit in federal district court, seeking a permanent injunction against enforcement of the tribal court judgment on the ground that it was void for lack of jurisdiction. The federal district court agreed that the tribal court lacked jurisdiction and promptly granted judgment in favor of the county and the law enforcement officers. The Nez Perce Tribe, including the tribal court and the judges of the tribal court, appealed to the Ninth Circuit Court of Appeals.

Almost eleven (11) years have now lapsed and the entire issue is still pending in the Ninth Circuit Court of Appeals. The case was originally argued and submitted to a three-judge panel November 16, 1995. The matter was withdrawn from submission March 20, 1997, for the reason that the panel was awaiting the decision of this Court in *Strate*. The matter was resubmitted July 1, 1997 and the order and opinion affirming the district court judgment was filed April 23, 1998. Amended opinions were filed May 5, 1998, and July 24, 1998. By order

filed July 31, 1998, the Ninth Circuit ordered that the case be re-heard by the Court of Appeals en banc. The case was argued to the Court sitting en banc on September 28, 1998. A decision is still pending.

Importantly, this needless waste of time and resources cannot be justified by any reference to a *congressional* directive—either in *Allen* or in this case. Accordingly, this Court should be especially reluctant to adopt the expansive reading of the exhaustion doctrine that the Ninth Circuit Court of Appeals has accepted.

ARGUMENT

I. THE HISTORY OF THE PRICE-ANDERSON ACT REVEALS THE INCOMPATABILITY BETWEEN TRIBAL COURT JURISDICTION AND THE FEDERAL STATUTORY SCHEME.

The exercise of jurisdiction by Indian tribes is inconsistent with the history of the Price-Anderson Act, as Petitioners and supporting *Amici* States have pointed out. This Court should find a jurisdictional prohibition of tribal jurisdiction when the history of congressional legislation and the surrounding circumstances reveal a disabling incompatibility between tribal court jurisdiction and the intended operation of a federal statutory scheme.

This Court relied upon the history of congressional legislation to determine the parameters of tribal court jurisdiction over non-members in *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 202 (1978) and *Duro v. Reina*, 495 U.S. 676 (1990). *See also, South Dakota v. Bourland*, 508 U.S. 679, 689 (1993). Similar considerations should be controlling here.

In addition to the unnecessary delay and expense noted above, it is also important to specially emphasize the fact that fundamental Constitutional rights are not ordinarily enforceable in tribal courts. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978). As a result, this Court in

Strate was clearly on solid ground when it narrowed the scope of the tribal exhaustion doctrine. This case calls for a similar conclusion.

CONCLUSION

For the foregoing reasons, the decision of the Ninth Circuit Court of Appeals should be reversed.

Respectfully submitted,

MARC A. LYONS
RAMSDEN & LYONS
P.O. Box 1336
700 Ironwood Dr.
Suite 301
Coeur D'Alene, ID 83816
(208) 664-5818

KIMRON R. TORGERSON *
Lewis County
Prosecuting Attorney
P.O. Box 398
Nezperce, ID 83543
(208) 937-2271

TOM D. TOBIN
TOBIN LAW OFFICES, P.C.
P.O. Box 730
422 Main Street
Winner, SD 57580
(605) 842-2500

Dated: December 8, 1998 * *Counsel of Record*

Supreme Court, U.S.
FILED
JAN 14 1999
CLERK

No. 98-6

IN THE
Supreme Court of the United States

OCTOBER TERM, 1998

EL PASO NATURAL GAS COMPANY, ET AL.,

Petitioners,

v.

LAURA NEZTSOSIE, ET AL.,

Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

BRIEF *AMICUS CURIAE* OF BERTRAM ROBERTS, HANNI ROBERTS, AND PUBLIC CITIZEN IN SUPPORT OF RESPONDENTS

BRIAN WOLFMAN
(Counsel of Record)
ALAN B. MORRISON
PUBLIC CITIZEN LITIGATION GROUP
1600 20th Street, N.W.
Washington, D.C. 20009
(202) 588-1000

ERVIN A. GONZALEZ
RAYMOND W. VALORI
ROBLES & GONZALEZ
Suite 900
One Bayfront Plaza
100 Biscayne Boulevard
Miami, Florida 33131
(305) 371-5944

Attorneys for *Amici*

January 14, 1999

32pp

BEST AVAILABLE COPY

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTEREST OF AMICI 1

STATEMENT OF THE CASE 3

A. The Price-Anderson Act. 3

1. Enactment and 1966 Amendments. 3

2. The 1988 Amendments. 5

B. Facts and Proceedings in *Roberts v. Florida Power & Light*. 7

SUMMARY OF ARGUMENT 9

ARGUMENT 10

A. This Court's Decision In *Strate* Does Not Require Reversal. 10

B. The Price-Anderson Act Does Not Completely Preempt Respondents' Claims. 13

1. The PAA Does Not Completely Preempt The Jurisdiction Of Non-Federal Courts, Including Tribal Courts. 14

2. The PAA Is Not A Complete Preemption Statute Because The Applicable Law In A Public Liability Action Is Not Federal Law. 15

3. Tribal Courts Have Jurisdiction To Hear Public Liability Actions. 22

CONCLUSION 26

TABLE OF AUTHORITIES

CASES

PAGE(S)

Avco Corp. v. Aero Lodge No. 735, 390 U.S. 557 (1968) 13, 15

California Fed'l Savings & Loan Association v. Guerra, 479 U.S. 272 (1987) 17

Cipollone v. Liggett Group, Inc., 505 U.S. 504 (1992) 16

Duke Power Co. v. Carolina Environmental Study Group, Inc., 438 U.S. 59 (1978) 3

Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938) 17

Good Samaritan Hospital v. Shalala, 508 U.S. 402 (1993) 18

Goodyear Atomic Corp. v. Miller, 486 U.S. 174 (1988) 21

Gulf Offshore Co. v. Mobil Oil Corp., 453 U.S. 473 (1981) 22

Iowa Mutual Insurance Co. v. LaPlante, 480 U.S. 9 (1987) 9, 11

Medtronic, Inc. v. Lohr, 518 U.S. 470 (1966) 2

Montana v. United States, 450 U.S. 544 (1980) 11

Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Commission, 461 U.S. 190 (1983) 8, 20

Roberts v. Florida Power & Light, 146 F.3d 1305 (11th Cir. 1998), *pet. for cert. filed*, No. 98-640 (U.S. filed Oct. 16, 1998) 1, 5, 8, 9

Roberts v. Florida Power & Light Co., No. 98-640 (U.S. filed Oct. 16, 1998) 1

Silkwood v. Kerr-McGee Corp., 464 U.S. 238 (1984) 6, 8, 20, 21

Stibitz v. GPU, 746 F.2d 993 (3d Cir. 1984), *cert. denied*, 469 U.S. 1214 (1985) 19

Strate v. A-1 Contractors, 520 U.S. 438 (1997) 8, 9, 10, 11, 12

Yamaha Motor Corp. v. Calhoun, 516 U.S. 199 (1996) 2

STATUTES, RULE, AND LEGISLATIVE HISTORY

28 U.S.C. 1353 25

28 U.S.C. 1441(a) 25

28 U.S.C. 1443 25

28 U.S.C. 1447(a) 25

42 U.S.C. 2014(q) 9, 15

42 U.S.C. 2014(w) 9, 15

42 U.S.C. 2014(hh) 2, 7, 8, 9, 14, 16, 18

42 U.S.C. 2073 18

42 U.S.C. 2093 18

42 U.S.C. 2095 18

42 U.S.C. 2111 18

42 U.S.C. 2133 18

42 U.S.C. 2134 18

42 U.S.C. 2201 18

42 U.S.C. 2210 ..... *passim*

42 U.S.C. 2210(e) 17

42 U.S.C. 2210(n)(1) 4

42 U.S.C. 2210(n)(2) 7, 9, 14, 23, 24

42 U.S.C. 2210(s) 7, 17

42 U.S.C. 2232 18

42 U.S.C. 2236 18

Fed. R. Civ. P. 12(b)(6) 8

S. Rep. No. 1605, 89th Cong., 2d Sess. (1966), *reprinted in* 1966 U.S.C.C.A.N. 3201 ..... 4, 5, 18, 19

H.R. Rep. No. 104, 100th Cong., 1st Sess. (1987) 3, 6, 7, 20, 23

S. Rep. No. 70, 100th Cong., 1st Sess. (1987), *reprinted in* 1988 U.S.C.C.A.N. 1424 ..... 3, 6, 20

S. Rep. No. 218, 100th Cong., 1st Sess. (1987), *reprinted in* 1988 U.S.C.C.A.N. 1476 ..... 3, 4, 6, 19

H.R. Conf. Rep. No. 383, 103d Cong., 1st Sess. (1993) ... 23

S. Rep. No. 88, 103d Cong., 1st Sess. (1993) 23

REGULATIONS

10 C.F.R. Part 20 18

10 C.F.R. 20.1003 22

10 C.F.R. 20.1101(b) 22

10 C.F.R. 20.1201 18

10 C.F.R. 20.1201(a) 21

MISCELLANEOUS

NRC, *The Price Anderson Act —Crossing the Bridge to the Next Century* (Aug. 1998) 25

C. Wright, *The Law of Federal Courts* (4th ed. 1983) 22

INTEREST OF AMICI[1]

Bertram Roberts and Hanni Roberts are the plaintiffs in a suit now pending before this Court on a petition for a writ of certiorari. *See Roberts v. Florida Power & Light Co.*, No. 98-640 (filed Oct. 16, 1998). Mr. Roberts alleges that he developed leukemia as a result of radiation exposure at a nuclear power plant where he worked as an electrician for 23 years. The Robertses maintain that the power plant operator is liable for their damages under Florida common law. The Eleventh Circuit held, however, that their common-law claims are preempted by federal regulations promulgated by the Nuclear Regulatory Commission ("NRC") that establish the maximum permissible radiation dose at nuclear plants. The Eleventh Circuit concluded that those dose regulations provide the sole duty of care in any case involving damages from radiation exposure, and that, because the Robertses had not claimed a violation of those regulations, their claims were preempted. *Roberts v. Florida Power & Light*, 146 F.3d 1305 (11th Cir. 1998).

In this case, the El Paso petitioners' principal argument for reversal is that there is no basis for tribal jurisdiction in a case concerning nuclear radiation because federal law, in particular the Atomic Energy Act and its Price-Anderson Act ("PAA") amendments, 42 U.S.C. 2210 *et seq.*, completely preempts the field of nuclear power. In so arguing, petitioners rely on the Eleventh Circuit's ruling in *Roberts* and other decisions holding that federal regulations provide the exclusive

---

[1] Letters of consent to the filing of this brief have been lodged with the Clerk. Pursuant to Rule 37.6 of this Court, *amici* state that no party had any role in writing this brief and that no one other than *amici* or their counsel made a monetary contribution to its preparation or submission.

duty of care in cases involving nuclear radiation torts. *See* Brief for Petitioners ("Pet. Br.") 21. As we argue below, petitioners are wrong on the tribal jurisdictional question, because the PAA does not expressly or impliedly bar tribal courts from hearing nuclear radiation torts. Moreover, even if this Court were to resolve the question presented *against* tribal jurisdiction, the Robertses have a very strong interest in how this Court comes to that conclusion. In particular, if the Court were to decide this case on the basis urged by petitioners—the purported preemptive effect of federal law—such a ruling might place this Court's imprimatur on the Eleventh Circuit's ruling in *Roberts*.

As the Robertses show below, the PAA does not preempt state-law standards of care, but in fact specifically adopts them. *See* 42 U.S.C. 2014(hh). This fact not only demonstrates the flaw in the Eleventh Circuit's decision in *Roberts* (and the need for this Court to review that decision), but is also the key to understanding why the Ninth Circuit was correct in upholding the exercise of tribal jurisdictional here.

Public Citizen is a non-profit consumer advocacy group with approximately 150,000 members nationwide. It has a longstanding interest in tort cases that raise federal preemption issues, because it believes that expansive interpretations of the preemptive scope of federal statutes, such as that advanced by petitioners here, can serve to undermine congressional intent and the ability of injured parties to obtain compensation. Public Citizen has particular expertise on the preemption issue before the Court, because its attorneys represent the Robertses. Moreover, Public Citizen has a broad outlook on preemption issues that may be useful to the Court, because its attorneys have represented plaintiffs in a wide range of tort preemption cases. *See, e.g., Medtronic, Inc. v. Lohr*, 518 U.S. 470 (1996); *Yamaha Motor Corp. v. Calhoun*, 516 U.S. 199 (1996).

STATEMENT OF THE CASE

The parties have adequately set out the facts of the underlying suits and the decisions below involving the tribal exhaustion doctrine. However, in order to explain the errors in petitioners' analysis, Part A provides a history of the PAA. Then, in Part B, we briefly recount the facts and decision in *Roberts* in order to show the potential overlap between that case and the cases now before this Court.

A. The Price-Anderson Act.

1. Enactment and 1966 Amendments.

The PAA was enacted in 1957 as an amendment to the Atomic Energy Act of 1954 to encourage private development of nuclear power plants. To overcome private sector reluctance to provide atomic power because of the potential for catastrophic accidents and the unavailability of private liability insurance, the PAA provided a system of compensation for injuries resulting from nuclear accidents. S. Rep. No. 218, 100th Cong., 1st Sess. 2 (1987), *reprinted in* 1988 U.S.C.C.A.N. 1477; H.R. Rep. No. 104, 100th Cong., 1st Sess., pt. 1 at 4 (1987). Thus, the PAA established a system of comprehensive liability insurance for providers of nuclear energy under contract or license with the government. S. Rep. No. 70, 100th Cong., 1st Sess. 13-14 (1987), *reprinted in* 1988 U.S.C.C.A.N. 1426-27; *see generally Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 64-67 (1978).

The 1957 law had three features. First, it limited the

aggregate liability of private nuclear operators under contract or license with the federal government. Second, it channeled so-called "public liability" actions—those arising from nuclear accidents—by providing that any person who might be held liable for an accident would be indemnified by the federal government. Third, it required that, in cases where claims for public liability exceeded the required level of private insurance, the federal government would reimburse the person held liable up to the Act's aggregate liability limit. S. Rep. No. 218, *supra* at 2, *reprinted in* 1988 U.S.C.C.A.N. 1477.

In 1966, Congress amended the PAA out of concern that the public be quickly and adequately compensated for injuries resulting from a nuclear accident by, among other things, providing for development of a compensation and distribution plan in the event that claims exceeded the Act's aggregate liability limits. S. Rep. No. 1605, 89th Cong., 2d Sess. (1966), *reprinted in* 1966 U.S.C.C.A.N. 3201-03. The amendments also sought to simplify the system for compensation of public liability claims and to ensure similar treatment of claims arising out of certain nuclear accidents. Thus, under the "waiver-of-defenses" provision, 42 U.S.C. 2210(n)(1), defendants in cases involving a large nuclear accident, known as an "extraordinary nuclear occurrence" ("ENO"), could be required to waive any defenses related to (1) the plaintiff's conduct or the defendant's lack of fault, (2) government or charitable immunity, and (3) the statute of limitations, if the suit were filed within three years of the date the plaintiff became aware of his injuries or damages, but no more than ten years after the date of the nuclear incident. *See* S. Rep. No. 1605, *supra*, *reprinted in* 1966 U.S.C.C.A.N. 3201-02; *see also* S. Rep. No. 218, *supra* at 2, *reprinted in* 1988 U.S.C.C.A.N. 1477-78. In essence, the waiver-of-defenses provision required an ENO victim "to prove only that he or his property was damaged and that such damage

was caused by the nuclear incident." S. Rep. No. 1605, *supra*, *reprinted in* 1966 U.S.C.C.A.N. 3209. As a result, for ENO claims, all courts would apply principles similar to strict liability. *Id.* at 3207.

The 1966 amendments also created federal jurisdiction for claims involving an ENO in the district where the accident occurred. This jurisdictional provision allowed the defendants to remove actions pending in state courts and to transfer actions pending in other federal courts to the federal district court having venue. This provision thus allowed claims arising out of a single serious nuclear accident (ENO) to be consolidated in one court. *Id.* at 3215.

2. The 1988 Amendments.

In 1988, Congress passed another set of PAA amendments, which are important to understanding the issues before this Court. In the amici's view, the 1988 law underscores the error committed by the Eleventh Circuit in their case, because that law explicitly adopts state substantive law in cases involving personal injuries caused by nuclear radiation. On the other hand, the El Paso petitioners and the United States contend here that the 1988 amendments support their argument that federal law completely preempts the field of nuclear energy, and thus requires reversal of the decision below. Pet. Br. 9-26; Brief for the United States as Amicus Curiae ("U.S. Br.") 13-20. Indeed, petitioners and the Solicitor General concede that had respondents' claims arisen prior to 1988, there would be no preemption because persons claiming injury from radiation could recover under any state-law theory of liability. *See* Pet. Br. 13-15; U.S. Br. 17; *see also Roberts*, 146 F.3d at 1308 n.5 (suggesting dispositive effect of 1988 amendments).

But this substantial loss of rights for those harmed by radiation is impossible to square with the 1988 amendments, whose main thrust, like the 1966 legislation, was to improve the compensation system for victims of nuclear exposure, not to restrict or eliminate liability for the nuclear industry. Thus, the 1988 law extended the indemnification system for thirty years; increased the aggregate indemnification level; created an expedited mechanism to allow congressional action for additional compensation; and broadened the scope of the public compensation system to include nuclear waste disposal activities and incidents involving stolen nuclear materials. S. Rep. No. 70, *supra* at 12, *reprinted in* 1988 U.S.C.A.A.N. 1425. The amendments also clarified that lessors of nuclear facilities could not be held liable for nuclear accidents occurring in the facility, and they barred awards of punitive damages where the federal government would be liable for them under an indemnification agreement. H.R. Rep. No. 104, *supra*, pt. 1 at 19. This latter provision was a response to the Court's decision in *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1984), which held that the Atomic Energy Act, as informed by the PAA, does not preempt an award of punitive damages under state tort law arising out of radiation exposure from a nuclear power plant.

The 1988 amendments also included two responses to litigation over the Three Mile Island incident. S. Rep. No. 218, *supra* at 13, *reprinted in* 1988 U.S.C.C.A.N. 1488. All of the Three Mile Island suits were originally consolidated in the District Court for the Middle District of Pennsylvania, where the accident occurred. After the Nuclear Regulatory Commission ("NRC") determined that the accident was not an ENO, however, the claims were dismissed for lack of subject matter jurisdiction since, absent diversity, federal jurisdiction extended only to ENOs. *Id.* To ensure that federal courts could

hear all types of nuclear incident claims, not just those involving ENOs, the 1988 amendments broadened the grant of original federal jurisdiction to cover all nuclear incidents. H.R. Rep. No. 104, *supra*, pt. 1 at 18, 50; *see* 42 U.S.C. 2210(n)(2). The law did not, however, bar suit in tribal courts, nor did it provide for removal from tribal courts to federal court.

The 1988 amendments also defined the term "public liability action," which was not defined in the 1966 amendment granting federal jurisdiction over ENO claims. That definition included an anti-preemption clause, which specifically adopts state substantive law, presumably to ensure that the grant of federal jurisdiction would not suggest that the courts develop a body of federal substantive law. Thus, in a public liability action "the substantive rules for decision ... shall be derived from the law of the State in which the nuclear incident involved occurs, unless such law is inconsistent with the provisions of" 42 U.S.C. 2210. *See* 42 U.S.C. 2014(hh).

The "provisions" of section 2210, in turn, concern a variety of issues such as indemnification, collection of fees from NRC licensees, and regulatory reports to Congress. *See* 42 U.S.C. 2210. With the exception of section 2210(s)—the provision barring punitive damages in certain circumstances—the 1988 amendments did not limit the level of compensation to be awarded in a public liability action, much less address the substantive standard of care in such an action.

B. Facts and Proceedings in *Roberts v. Florida Power & Light.*

As noted earlier, the Robertses' suit seeks damages for injuries suffered by Bertram Roberts while working at the Turkey Point Nuclear Power Plant operated by Florida Power

& Light Company ("FPL") from 1966-1989. In January 1993, Mr. Roberts was diagnosed with myelogenous leukemia, a type of cancer linked to radiation exposure. Eleventh Circuit Record Excepts in *Roberts v. Florida Power & Light*, at 9-10.

The Robertses filed suit under Florida common law, contending that FPL breached a duty of reasonable care by exposing Mr. Roberts to more radiation than was necessary, by not helping him take precautionary steps, such as providing appropriate protective clothing, and by not warning him of the danger of working at the plant. *Id.* at 11-12. The complaint also contained a strict liability claim. *Id.* at 13-14. Mr. Roberts's wife, Hanni Roberts, claimed loss of consortium. *Id.* at 15.

FPL moved to dismiss the complaint under Federal Rule of Civil Procedure 12(b)(6), arguing that the PAA preempts any duty of care defined by state tort law for operators of nuclear power plants. The district court agreed, and dismissed the case. The Eleventh Circuit affirmed per curiam. *Roberts*, 146 F.3d 1305. The court stated that the federal government's exclusive role in regulating the safety of nuclear technology extended to actions for damages, as well as to state regulatory efforts, citing this Court's decisions in *Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Comm'n*, 461 U.S. 190 (1983), and *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1984). The court relied on *Silkwood* despite its holding that an award of punitive damages in a wrongful death action arising from nuclear plant radiation was *not* preempted by the Atomic Energy Act. Ignoring section 2014(hh)'s express adoption of state substantive law, the court of appeals stated that "federal regulations must provide the sole measure of the defendants' duty in a public liability action" because of the federal government's pervasive role in nuclear

regulation. *Roberts*, 146 F.3d at 1308. It therefore concluded that, because the Robertses could not show that FPL exposed Mr. Roberts to radiation in violation of the maximum federal dose, their claims under Florida law were preempted.

SUMMARY OF ARGUMENT

This Court's decision in *Strate v. A-1 Contractors*, 520 U.S. 438 (1997), does not require reversal. *Strate* held that a tribal court did not have jurisdiction over a car accident case that occurred on *non-Indian* land—a state highway running through a reservation. *Strate* is irrelevant to the situation here, where Indian plaintiffs allege that non-Indians committed wrongs on tribal land, a suit at the core of traditional tribal court jurisdiction. *See, e.g., Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 18 (1987) ("Tribal authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty"). In sum, there is no basis in the Indian law teachings of this Court to abrogate the ordinary rule of tribal exhaustion.

Aside from *Strate*, petitioners argue that the Price-Anderson Act completely preempts tribal courts from entertaining suits alleging injury from nuclear materials, *see* 42 U.S.C. 2014(q),(w), and thus overrides the ordinary rule requiring tribal court exhaustion. That assertion is wrong for two related reasons. First, the PAA does not expressly bar *any* court—state, federal, or tribal—from hearing nuclear tort actions; rather, the Act permits such actions to be filed in any general jurisdiction court, with a right of removal from state (but not tribal) court to federal court. *See* 42 U.S.C. 2210(n)(2). Second, with only a few exceptions, the applicable substantive law in a public liability action is *not* federal law, but state law, 42 U.S.C. 2014(hh), which demonstrates that the PAA does not have the pervasive preemptive effect that petitioners claim. The

Ninth Circuit was therefore correct in holding that tribal courts have the authority to determine, in the first instance, their own jurisdiction over nuclear tort cases without prior federal-court intervention.

ARGUMENT

From *amici*'s perspective, the issues in this case break down into two questions. First, does this Court's recent decision in *Strate v. A-1 Contractors*, 520 U.S. 438 (1997), concerning the civil jurisdiction of tribal courts, require reversal, as petitioners contend? That question is important because it is the only non-preemption-based reason given by petitioners for reversal of the Ninth Circuit's ruling. *See* Pet. Br. 29-33. If the answer to that question is "no," as we show in Part A below, the second question is whether the preemptive effect of the Price-Anderson Act is so pervasive as to bar the tribal courts in these cases from determining, in the first instance, their own jurisdiction. As we show in Part B, the answer to that question is also "no," because the PAA specifically provides that federal law is *not* the applicable substantive law in nuclear tort cases, thus undermining any claim that federal law occupies the field to the exclusion of state or tribal law.

A. This Court's Decision In *Strate* Does Not Require Reversal.

Petitioners argue that this Court's decision in *Strate v. A-1 Contractors*, 520 U.S. 438, requires reversal. In *Strate*, the Court held that a tribal court lacked jurisdiction to entertain a car accident case on a highway running through an Indian Reservation. The defendants were not tribe members, nor was the injured plaintiff (although the plaintiff's relatives who

claimed loss of consortium were members). The highway was maintained by the state of North Dakota, pursuant to a right-of-way granted to the state's highway department by the United States. The right-of-way lay on land held in trust for certain Indian tribes by the United States. *Id.* at 442-43.

Strate relied on the Court's earlier ruling in *Montana v. United States*, 450 U.S. 544 (1980), which established "a general rule that, absent a different Congressional direction, Indian tribes lack civil authority over the conduct of nonmembers on non-Indian land within a reservation." *Strate*, 520 U.S. at 446. The rule in *Strate* has nothing to do with a situation, like the one presented here, involving disputes that occur on Indian land and in which Indians are injured. As noted above, *Strate* concerned the conduct of non-members "on *non-Indian land* within a reservation." *Id.* at 446 (emphasis added); *see also id.* at 454 (the decision in *Montana* applies to "activity on alienated, non-Indian reservation land"). Indeed, the Court noted "that tribes retain considerable control over nonmember conduct on tribal land." *Id.* Or, as the Solicitor General puts it, *Strate* "is irrelevant where, as here, the conduct arises on tribal lands and therefore falls squarely within the heartland of tribal sovereignty...." U.S. Br. at 12; *see also Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 18 (1987) ("Tribal authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty").

Petitioners, but not the United States, nonetheless assert, in reliance on *Strate*, that, in *all* matters concerning authority over the conduct of non-Indians, a tribe's *adjudicative* jurisdiction does not extend beyond its *legislative* jurisdiction. Pet. Br. 30. In other words, petitioners maintain that, because Indian tribes cannot regulate the safety aspects of nuclear power, absent express congressional delegation, their courts

have no authority to adjudicate claims asserting injury from nuclear activities. Although one sentence of the *Strate* decision does equate tribal legislative and adjudicative jurisdiction, *id.* at 453, it is clear from the immediately preceding sentence of the Court's opinion that such a restriction on tribal jurisdiction applies only to "activity on *non-Indian* fee land within a reservation." *Id.* (emphasis added).

This view of *Strate* is consistent with the arguments that were advanced and rejected by the Court in that case. *Strate* considered the argument that *Montana* did not apply because the land where the accident occurred was held in trust for certain Indian tribes by the United States, *i.e.*, that the land where the accident occurred was equivalent to tribal land. The Court rejected that argument, not because ownership of the land did not matter, but because "[t]he right-of-way North Dakota acquired for the State's highway renders the 6.59-mile stretch [where the accident occurred] equivalent, for nonmember governance purposes, to alienated, non-Indian land." *Id.* at 454 (footnote omitted). Indeed, the Court analyzed the tribes' interest in the land in considerable detail, *id.* at 454-56, concluding that the tribes "reserved no right to exercise dominion or control over the right-of-way." *Id.* at 455. Thus, ownership of land was key to the Court's decision, and it was only because North Dakota's right-of-way extinguished tribal authority over the relevant piece of land that *Montana* controlled the outcome.

In sum, we cannot improve on the Solicitor General's conclusion regarding *Strate*: "[I]f a tribal court otherwise has jurisdiction to hear a case (*e.g.*, because the conduct occurred on tribal land), any qualification of the tribal court's authority ... cannot derive from the jurisdictional concerns underlying *Strate*. Any such qualification must derive instead from the

particular nature of the federal statutory scheme at issue." U.S. Br. 13. Therefore, we now turn to the relevant statutory scheme.

B. The Price-Anderson Act Does Not Completely Preempt Respondents' Claims.

The principal basis for reversal urged by petitioners and their amici, including the United States, is that respondents' claims arise under the PAA which, they assert, completely preempts all law other than federal law. As the Solicitor General correctly notes, an "ordinary" federal preemption defense is not the basis for removing a case from state to federal court or, in this case, for abrogating the tribal exhaustion doctrine, because such a defense does not arise on the face of a well-pleaded complaint. Rather, such ordinary preemption questions are decided by the court in which the case has been filed. *See* U.S. Br. 14.

But petitioners and the United States maintain that the preemption defense here is not an ordinary preemption defense, but rather one of "complete preemption." *See* U.S. Br. 14. Where that doctrine applies, as it sometimes does, for instance, in the labor law context, *see Avco Corp. v. Aero Lodge No. 735*, 390 U.S. 557 (1968), the federal interest in the subject matter is so pervasive that the defendant may remove a case filed in state court on the strength of that interest, and the federal court will decide the preemption issue, even though no federal issue appears on the face of the complaint. Thus, the argument advanced here against tribal exhaustion takes the form of the following syllogism: The PAA is a complete preemption statute, and since complete preemption statutes allow the defendant immediate access to federal court, to require exhaustion in tribal court is inconsistent with the PAA.

Regardless of whether the conclusion of the syllogism (equating complete preemption with an absence of tribal jurisdiction) is correct, its premise is fatally flawed because the PAA is *not* a complete preemption statute.

In addressing the complete preemption doctrine, the fundamental inquiry must center around how the PAA actually operates with respect to the claims asserted by plaintiffs in nuclear tort cases. That inquiry, in turn, requires the Court to look at two separate, but related, questions: (1) What is the PAA's effect on *jurisdiction, i.e.*, which courts may entertain cases involving nuclear incidents; and, (2) What is the PAA's *substantive* effect, *i.e.*, which law applies in public liability actions? In neither area is the role of federal law so pervasive as to completely preempt the field.

1. *The PAA Does Not Completely Preempt The Jurisdiction Of Non-Federal Courts, Including Tribal Courts.*

As to jurisdiction, the PAA does not bar a plaintiff from filing a nuclear tort suit in *any* court. Rather, the PAA provides original federal jurisdiction in the district in which the alleged nuclear incident occurred, and allows (but does not require) a defendant to transfer a case from another federal district court, or to remove a case from any state court, to the district court where the ENO occurred. 42 U.S.C. 2210(n)(2). This removal authority is consistent with the fact that, since 1988, a suit alleging injury from a nuclear incident is a federal cause of action: a "public liability action" that is said to "aris[e] under" section 2210 of the PAA. *See* 42 U.S.C. 2014(hh). Of particular significance here, the PAA does not mention tribal jurisdiction; it does not bar suit in tribal court, *and* it does not authorize removal from tribal court to federal court. Whether

a public liability action may be maintained in tribal court is a close question, to which we will return later (*see infra* at 21-25), but for present purposes, it is clear that no bar to tribal jurisdiction appears in the text of the PAA. That being the case, based on the PAA's jurisdictional provision alone, there is no complete preemption of tribal jurisdiction that would justify abrogation of the tribal exhaustion doctrine. In other words, regardless of how the jurisdiction question is ultimately resolved, there is no basis to prevent a tribal court from considering that issue in the first instance.

2. *The PAA Is Not A Complete Preemption Statute Because The Applicable Law In A Public Liability Action Is Not Federal Law.*

In any event, petitioners' focus on the PAA's general preference for federal-court jurisdiction misconstrues the complete preemption doctrine. In our view, the principal question is not whether Congress provided a federal forum for resolving the dispute, but whether the federal *substantive* interest in the subject matter is so great that *only* a federal court should have authority to decide the preemption question. Thus, for instance, in the labor law context, complete preemption has been found because the federal government has occupied the field, and by doing so relegated to itself *substantive* power over labor policy, including the remedies available to workers and companies for violations of federal labor law. *See, e.g., Avco*, 390 U.S. at 129-30.

But the PAA specifically rejects that kind of complete preemption. Indeed, as we now explain, with a few exceptions, Congress has made clear that state, not federal, law applies in determining whether and to what extent persons claiming injury from nuclear incidents should be compensated.

Petitioners' complete preemption argument is premised on their assertion that respondents' suits are "public liability" actions created by the PAA. We acknowledge that the PAA's definition of "public liability," 42 U.S.C. 2014(w), which includes any "nuclear incident," 42 U.S.C. 2014(q), is quite broad, and we take no position on whether that definition extends to the mining (rather than nuclear power plant) activities at issue in the suits before this Court. Rather, we assume *arguendo* that respondents have filed public liability actions, and acknowledge that such actions arise under federal law (section 2210 of the PAA); however, the recognition that federal law establishes the cause of action represents the beginning, not the end, of the preemption analysis, because it does not tell us what body of substantive law is applicable to that cause of action.

Because the "touchstone" of any preemption analysis is congressional intent, as reflected in the language that Congress enacts, *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992), we turn first to the PAA's definition of "public liability action":

> The term "public liability action," as used in section 2210 of this title, means any suit asserting public liability. A public liability action shall be deemed to be an action arising under section 2210 of this title, and *the substantive rules for decision in such action shall be derived from the law of the State in which the nuclear incident involved occurs, unless such law is inconsistent with the provisions of such section.*

42 U.S.C. 2014(hh) (emphasis added). The most striking feature of section 2014(hh) is that, in the main, it is an *anti-*

preemption provision, under which state law provides "the substantive rules for decision" except where it is "inconsistent" with 42 U.S.C. 2210. *Cf. California Fed'l Savings & Loan Ass'n v. Guerra*, 479 U.S. 272, 281-82 (1987) (analyzing similar anti-preemption provision). Therefore, to understand the preemptive scope of the PAA, it is necessary to examine section 2210 to determine the precise subjects that it affects.

Generally speaking, section 2210 establishes the PAA's insurance and indemnification scheme, which ensures that funds will be available to compensate victims of a nuclear incident. There are a few provisions of section 2210 in which Congress altered state tort law, such as the limitation on aggregate public liability, 42 U.S.C. 2210(e), and the bar on punitive damages where the United States is obligated to make payments under an indemnity agreement, 42 U.S.C. 2210(s). Other than these provisions, however, federal law does not alter state-law rules of decision.

In making their preemption argument, petitioners and their *amici* point in particular to the Eleventh Circuit's decision in *Roberts* and other circuit court decisions that hold that federal regulations, including the federal radiation dose limits, preempt state-law duties of care. *See* Brief of American Nuclear Insurers ("ANI Br.") 23; *see also* Pet. Br. 21; U.S. Br. 18 n.10. But as the Robertses have explained in detail in their pending petition for a writ of certiorari, *see* Pet. for Writ. of Cert. in No. 98-640, at 13-24, those decisions are fundamentally flawed because the duty of care is a "substantive rule[] for decision"—indeed, *the* core rule for decision—in a tort action. *See Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 71 (1938) (applicable rule of decision was state-law duty of care). And because section 2210 does not abrogate state-law duties of care, they apply in all public liability actions, under the plain terms

of 42 U.S.C. 2014(hh).

In fact, the radiation dose limits on which the Eleventh Circuit in *Roberts* relied for preemption, *see* 10 C.F.R. 20.1201-.1208, are not based on the PAA generally, let alone on section 2210 in particular. Rather, as the NRC has noted, those dose limits are authorized by provisions of the Atomic Energy Acts of 1946 and 1954. *See* 10 C.F.R. Part 20, at p. 281 (1998) (citing 42 U.S.C. 2073, 2093, 2095, 2111, 2133, 2134, 2201, 2232, 2236 as "Authority"). In sum, section 2014(hh)—the sole provision that concerns applicable law in a public liability action—explicitly preserves, rather than preempts, damages claims based on a state-law duty of care. That conclusion demonstrates not only that the Eleventh Circuit's decision in *Roberts* is flatly wrong, but that there is no basis for finding that the complete preemption doctrine overrides the tribal exhaustion doctrine in the cases now before this Court.

Because the text of the PAA is clear, leaving no doubt that state, not federal, standards of care apply in a public liability action, there is no need to consult the Act's legislative history. *See, e.g., Good Samaritan Hosp. v. Shalala*, 508 U.S. 402, 409 (1993). In any event, the PAA's legislative history repeatedly confirms its plain meaning and Congress's desire to adopt state standards of care in public liability actions. The overriding purpose of both the 1966 and the 1988 PAA amendments was to authorize federal court *jurisdiction* over claims arising from nuclear incidents, not to impose federal substantive law. Indeed, in passing the 1966 amendments, Congress explicitly decided not to enact substantive law (*i.e.*, a new body of federal tort law). S. Rep. No. 1605, *supra*, *reprinted in* 1966 U.S.C.C.A.N. 3209. Rather, the approach taken by Congress was

> in keeping with the approach followed in enacting the original Price-Anderson Act—namely, *interfering with State law to the minimum extent necessary*. In essence, the plan adopted permits the *retention of State law* with respect to the cause of action and the measure of damages, but the requirements specified for the insurance contracts and the indemnity agreements provide the uniform rules needed to accomplish the bill's objectives. . . . *[T]his is not a measure designed either to accomplish a general revision of American tort law* or to set precedents for activities in other fields.

Id. (emphasis added).

The legislative history of the PAA's 1988 amendments emphasizes the same theme. Prior to 1988, no court had ever held that a state-law personal-injury claim against a nuclear plant operator was preempted by the PAA. Cases such as the Robertses' were governed by state law and, because federal question jurisdiction did not exist, were litigated in state court absent diversity. *See Stibitz v. GPU*, 746 F.2d 993, 995-97 (3d Cir. 1984), *cert. denied*, 469 U.S. 1214 (1985)). Although one of the purposes of the 1988 amendments was to broaden the grant of federal jurisdiction to cover all types of nuclear incidents, not just catastrophic accidents, those amendments did not supplant state substantive law. Instead, Congress's expressed intent was to authorize a single forum for such litigation and to avoid the inefficiencies that occurred in the wake of the Three Mile Island incident. *See* S. Rep. No. 218, *supra* at 13, *reprinted in* 1988 U.S.C.C.A.N. 1488. Thus, "[r]ather than designing a new body of substantive law to govern [public liability actions], ... the substantive rules for decision [were to] be derived from the law of the state in which

the nuclear incident involved occurs." H.R. Rep. No. 104, *supra*, pt. 1 at 18. There is much more similar legislative history, *see, e.g.*, S. Rep. No. 70, *supra* at 20, *reprinted in* 1988 U.S.C.C.A.N. at 1433; H.R. Rep. No. 104, *supra*, pt. 1 at 5, and, to our knowledge, none to the contrary.

In our judgment, given the PAA's text and legislative history, any argument for complete preemption of the field of nuclear radiation torts must fail. Moreover, in light of the broad role that Congress has mandated for state substantive law under the PAA, complete preemption cannot be justified on the ground that federal law "occupies the field" of nuclear safety.

To be sure, in *Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Comm'n*, 461 U.S. 190, 205 (1983), this Court intimated that there was no room for state regulation of nuclear safety. However, the very next Term, *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1984), held that the preemptive effect of the PAA should "*not* be judged on the basis that the Federal Government has so completely occupied the field of nuclear safety that state remedies are foreclosed." 464 U.S. at 256 (emphasis added). To the contrary, the Court said that

> it is clear that in enacting and amending the Price-Anderson Act, Congress assumed that state-law remedies, *in whatever form they might take*, were available to those injured by nuclear incidents. This was so even though it was well aware of the NRC's exclusive authority to regulate safety matters. No doubt there is tension between the conclusion that safety regulation is the exclusive concern of the federal law and the conclusion that a State may

> nevertheless award damages *based on its own law of liability*. But as we understand what was done over the years in the legislation concerning nuclear energy, Congress intended to stand by both concepts and to tolerate whatever tension there was between them. We can do no less. It may be that the award of damages based on the state law of negligence or strict liability is regulatory in the sense that a nuclear plant will be threatened with damages liability if it does not conform to state standards, but that regulatory consequence was something that Congress was quite willing to accept.

Id. (emphasis added); *see also Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 186 (1988) (characterizing *Silkwood*: "Congress was willing to accept regulatory consequences of application of state tort law to radiation hazards even though direct state regulation of safety aspects of nuclear energy was pre-empted").

The lack of conflict between a state-law damages action and federal regulatory objectives is underscored in the Robertses' case by the dual nature of the federal dose requirements. The regulations set maximum permissible dose limits, which form a ceiling for exposure levels permitted by the NRC. 10 C.F.R. 20.1201(a). The federal regulations also recognize that the federal maximum radiation levels may not provide adequate protection from radiation exposure and thus directs business to take additional precautions: "The licensee shall use, to the extent practicable, procedures and engineering controls based upon sound radiation protection principles to achieve occupational doses and doses to members of the public that are as low as is reasonably achievable (ALARA)." 10

C.F.R. 20.1101(b); *see also Silkwood*, 464 U.S. at 243 & n.6 (describing ALARA); 10 C.F.R. 20.1003 (defining ALARA). Thus, state standards of care provide another incentive for nuclear power plant operators to decrease the levels of radiation emitted at their plants, and as such, they further, rather than undermine, federal nuclear safety objectives.

3. *Tribal Courts Have Jurisdiction To Hear Public Liability Actions.*

Since the PAA is not a complete preemption statute, tribal courts are plainly competent, in the first instance, to determine the preemption question and, in effect, their own jurisdiction. The question whether tribal courts have jurisdiction over public liability actions is, of course, a separate question, and one which the Court may not reach here because of respondents' failure to cross-appeal from that portion of the lower court's injunctions that held that the tribal court could not entertain claims arising under the PAA. Although the answer is not free from doubt, we believe that public liability actions may be filed in tribal court, without a right of removal to federal court. In any event, the fact that it is a close question underscores the correctness of the decision below on the exhaustion issue.

As noted earlier, the PAA does not expressly address tribal jurisdiction. Ordinarily, when Congress creates a cause of action with original jurisdiction in the federal courts, without expressly negating jurisdiction in other courts, as it has done here with the public liability action, it is assumed that the jurisdiction of non-federal courts is concurrent. *See Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 477-78 (1981); *see generally* C. Wright, *The Law of Federal Courts* 268-69 (4th ed. 1983). And that presumption of concurrent jurisdiction

applies to tribal courts with equal, if not more, force as it does to state courts, because of the weight traditionally accorded tribal court sovereignty over matters involving Indians on reservation land. *See* S. Rep. No. 88, 103d Cong., 1st Sess. 8-9 (1993); H. R. Conf. Rep. No 383, 103d Cong., 1st Sess. 13 (1993); U.S. Br. 10 & n.6. The fact that the PAA permits removal of public liability actions from state to federal court, but makes no mention of tribal courts, might be taken as an indication that the Members of Congress who voted for the 1988 PAA amendments never gave any thought to the possibility that nuclear tort suits would be filed in tribal court. Although that may be true, Congress is presumed to speak through the text of enacted statutes, and absent strong evidence to the contrary, which does not exist here, tribal courts have jurisdiction over public liability actions given Congress's failure to bar such actions.

On the other hand, the 1988 PAA amendments express a preference for federal-court jurisdiction, by allowing all nuclear incident claims to be filed in the district where the incident occurred, and providing an absolute right of removal from state to federal court. 42 U.S.C. 2210(n)(2). Moreover, we acknowledge that the principal purpose of these provisions was to allow multiple cases involving one nuclear incident to be centralized in one court, H.R. Rep. No. 104, *supra*, pt. 1 at 18, and allowing public liability actions to go forward in tribal courts might undermine that objective to some degree. As the Solicitor General points out (U.S. Br. 23), however, many cases, such as the Robertses' and the cases presently before the Court, involve only one set of plaintiffs and therefore cannot possibly frustrate any interest in consolidation. On balance, we do not believe that the congressional goal of efficiency is enough to counter the PAA's failure explicitly to abrogate tribal

court jurisdiction.[2]

Two other factors weigh in favor of tribal court jurisdiction. First, although it is possible that Congress did not contemplate tribal jurisdiction over public liability actions, it is equally possible that Congress did consider the matter and simply chose not to alter the basic presumption in favor of tribal jurisdiction. As respondents point out in their brief, uranium mining activities on reservation land are not unusual, and

---

[2] *Amicus* American Nuclear Insurers agrees that public liability actions may be filed in tribal court because the PAA provides no basis for abrogating tribal court jurisdiction, but argues that defendants in public liability actions should be permitted to remove a case from tribal court to federal court. ANI Br. 21-22. This "solution" must be rejected because it has no basis in the PAA, which allows removal only from state, not tribal, courts. 42 U.S.C. 2210(n)(2). Recognizing this fact, and because of "the rule favoring retained tribal sovereignty to the extent consistent with federal law," the Solicitor General would permit a public liability action to be filed in tribal court, but then allow a defendant, after providing notice in the tribal court, to obtain a federal court injunction against the exercise of tribal court jurisdiction. U.S. Br. 24, 25. The Solicitor General says that the tribal court plaintiffs would be "free to refile ... in federal court." *Id.* at 25. Like the American Nuclear Insurers' position, this "different approach" (*id.* at 24) has no basis in the PAA, and comes with the added burden that, upon re-filing their cases in federal court, the plaintiffs may find that the statute of limitations has run. Petitioners' *amici* fail to recognize that the question here is not whether an alternative scheme may be a good idea, but whether Congress authorized it.

Congress might reasonably have envisioned suits such as those at issue here, but chose not to force them all into federal court because of concerns about tribal sovereignty. Indeed, the very fact that the NRC has recently "recommend[ed] that Congress should determine whether a public liability action ... may be filed in a tribal court," NRC, *The Price Anderson Act—Crossing the Bridge to the Next Century* 131 (Aug. 1998), strongly suggests that, under the current scheme, the agency charged with implementing the PAA believes that, as the PAA is currently written, public liability actions may be tried in tribal courts.

Second, the PAA's jurisdictional provision, particularly its language concerning removal, was not written on a blank slate, but rather against the backdrop of other jurisdictional statutes that provide for removal of various categories of cases from state to federal court, and do not mention removal from tribal courts. *See, e.g.*, 28 U.S.C. 1441(a), 1443; *see also* 28 U.S.C. 1447(a). Since no one disputes that tribal courts are competent to hear those kinds of cases, *see* U.S. Br. 22 ("tribal courts are courts of general subject-matter jurisdiction, and ... they are presumed competent to adjudicate claims arising under any source of law, including federal law"), it follows that tribal courts have jurisdiction to hear public liability actions. Indeed, Congress has provided original federal jurisdiction in some cases involving Indian tribes, *see, e.g.*, 28 U.S.C. 1353, demonstrating that Congress knows how to create federal jurisdiction on matters affecting Indians when it wishes to do so, and that it did not do so in the PAA.

In sum, tribal courts have jurisdiction to hear public liability actions and there is no basis for removing those actions to federal court. Although that conclusion is not directly relevant to this case unless this Court takes up the validity of

the district court's injunctions favoring petitioners, it leaves no doubt that the Ninth Circuit did not err on the tribal exhaustion question.

CONCLUSION

The decision of the court of appeals should be affirmed.

Respectfully submitted,

Brian Wolfman
(Counsel of record)
Alan B. Morrison
Public Citizen Litigation Group
1600 20th Street, N.W.
Washington, D.C. 20009-1001
(202) 588-1000

Raymond W. Valori
Ervin A. Gonzalez
Robles & Gonzalez, P.A.
Suite 900, One Bayfront Plaza
100 South Biscayne Boulevard
Miami, FL 33131-2011
(305) 371-5944

Attorneys for *Amici* Bertram Roberts, Hanni Roberts, and Public Citizen

January 14, 1999

(16)

No. 98-6

Supreme Court, U.S.
FILED
JAN 14 1999
CLERK

In The

Supreme Court of the United States

October Term, 1998

EL PASO NATURAL GAS COMPANY, A DELAWARE CORPORATION; CYPRUS FOOTE MINERAL COMPANY, A PENNSYLVANIA CORPORATION; AND CYPRUS AMAX MINERALS COMPANY, A DELAWARE CORPORATION,

Petitioners,

v.

LAURA NEZTSOSIE; ARLINDA NEZTSOSIE; AND ZONNIE MARIE DANDY RICHARDS, INDIVIDUALLY AND AS REPRESENTATIVE OF THE ESTATE OF HAROLD J. RICHARDS, SR.,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

BRIEF *AMICUS CURIAE* OF THE FALLON PAIUTE-SHOSHONE TRIBE IN SUPPORT OF RESPONDENTS

MELODY L. MCCOY*
KIM JEROME GOTTSCHALK
NATIVE AMERICAN RIGHTS FUND
1506 Broadway
Boulder, CO 80302
(303) 447-8760
**Counsel of Record for Amicus Curiae the Fallon Paiute-Shoshone Tribe*

January 14, 1999

18pp

BEST AVAILABLE COPY

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF THE *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 2

I. UNLESS CONGRESS PROVIDES OTHERWISE, TRIBAL COURTS HAVE AUTHORITY OVER CLAIMS ARISING UNDER FEDERAL LAW 2

II. ADDITIONALLY, UNLESS CONGRESS PROVIDES OTHERWISE, TRIBES HAVE THE POWER TO PROVIDE LEGAL REMEDIES UNDER TRIBAL LAW FOR CIVIL WRONGS COMMITTED WITHIN THEIR TERRITORY 9

CONCLUSION 13

TABLE OF AUTHORITIES

Page

CASES

Basil Cook Enter., Inc. v. St. Regis Mohawk Tribe, 117 F.3d 61 (2nd Cir. 1997) 10

Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation, 492 U.S. 408 (1989)..... 11

Burnham v. Superior Court, 495 U.S. 604 (1990)..... 11

Calumet Gaming Group-Kansas, Inc. v. Kickapoo Tribe of Kansas, 987 F.Supp. 1321 (D. Kan. 1997) 7

Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831) 2

City of Timberlake v. Cheyenne River Sioux Tribe, 10 F.3d 554 (8th Cir. 1993), *cert. denied*, 512 U.S. 1236 (1994)..... 10

Iowa Mutual Insurance Co. v. LaPlante, 480 U.S. 9 (1987)..... *passim*

Keeton v. Hustler Magazine, Inc., 465 U.S. 770 (1984) 11

Kiowa Tribe of Oklahoma v. Manufacturing Tech., Inc., 118 S.Ct. 1700 (1998) 2

Medtronic, Inc. v. Lohr, 518 U.S. 470 (1996)..... 6

Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982)..*passim*

Middlemist v. Lujan, 824 F.Supp. 940 (D. Mont. 1993), *aff'd without opinion*, 19 F.3d 1318 (9th Cir. 1994), *cert. denied*, 513 U.S. 961 (1994)..... 7

Montana v. United States, 450 U.S. 544 (1981) 3, 12

TABLE OF AUTHORITIES – Continued

Page

National Farmers Union Insurance Cos. v. Crow Tribe, 471 U.S. 845 (1985)..... *passim*

Nevada v. Hicks, 944 F.Supp. 1455 (D. Nev. 1996), *appeal docketed*, No. 96-17315 (9th Cir. Dec. 20, 1996)..... 1

New Mexico v. Mescalero Apache Tribe, 462 U.S. 324 (1983) 11

Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978) 7

Pratt v. Paris Gaslight & Coke Co., 168 U.S. 255 (1897) 8

Prescott v. Little Six, Inc., 897 F.Supp. 1217 (D. Minn. 1995) 7

Romero v. Peterson, 930 F.2d 1502 (10th Cir. 1991) 10

Sanders v. Robinson, 864 F.2d 630 (9th Cir. 1988), *cert. denied*, 490 U.S. 1110 (1989) 10

Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978) ..... *passim*

Smith v. Moffett, 947 F.2d 442 (10th Cir. 1991) 7

Sony Corp. v. Universal City Studios, Inc., 464 U.S. 417 (1984)..... 6

Strate v. A-1 Contractors, 520 U.S. 438, 117 S.Ct. 1404 (1997)..... 3

United States v. Mazurie, 419 U.S. 544 (1975)..... 3

United States v. Plainbull, 957 F.2d 724 (9th Cir. 1992)..... 7

United States v. Wheeler, 435 U.S. 313 (1978)..... *passim*

TABLE OF AUTHORITIES – Continued

Page

Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134 (1980).....12, 13

Watson v. Employers Liability Assurance Corp., 348 U.S. 66 (1954) 11

Will v. Calvert Fire Insurance Co., 437 U.S. 655 (1978) 9

Williams v. Lee, 358 U.S. 217 (1959).....4, 5, 10, 12

STATUTES AND LEGISLATIVE MATERIALS

9 U.S.C. § 2 7

18 U.S.C. §§ 225-228 5

18 U.S.C. § 2265 5

25 U.S.C. § 179 7

25 U.S.C. §§ 1301-1303.....4, 6

25 U.S.C. §§ 1901-1925 6

25 U.S.C. §§ 3601-3631.....4, 11

29 U.S.C. §§ 1001-1132 7

42 U.S.C. § 1983 1

S. 2747, 100th Cong. (1988) 4

S. 1752, 102d Cong. (1991) 4

H.R. 1268, 103d Cong. (1993) 4

Enforcement of the Indian Civil Rights Act: Hearing before the United States Commission on Civil Rights, 100th Cong., 2d Sess. (1988) 4

TABLE OF AUTHORITIES – Continued

Page

EXECUTIVE MATERIALS

The Indian Civil Rights Act: A Report of the United States Commission on Civil Rights (June 1991) 4

TREATISES AND ARTICLES

Felix S. Cohen, *Handbook of Federal Indian Law* (1982 ed.) 8

Felix S. Cohen, *Handbook of Federal Indian Law* (1945 ed.) 2-3

Judge Robert E. Keeton, *Part I: The Changing Lives of Professionals in Law*, 37 Ariz. L. Rev. 419 (1995) 11

INTEREST OF THE *AMICUS CURIAE*[1]

The Fallon Paiute-Shoshone Tribe is a federally recognized Indian tribe. The Fallon Tribe is a party to a case pending before the Court of Appeals for the Ninth Circuit, *Nevada v. Hicks, appeal docketed*, No. 96-17315 (9th Cir. Dec. 20, 1996). In *Nevada v. Hicks*, following exhaustion of tribal remedies, the federal district court for the district of Nevada upheld tribal court jurisdiction on the merits. 944 F. Supp. 1455 (D. Nev. 1996). The underlying claims in *Nevada v. Hicks* arose on Indian trust land within an Indian reservation. 944 F. Supp. at 1458 & 1466 n.21. They were brought by a tribal member against non-Indians under federal statutory law – 42 U.S.C. § 1983 – and under tribal common law. *Id.* at 1459 & 1466-1468.

This Court's decision in the present case will likely impact *Nevada v. Hicks*. The present case involves the exhaustion of tribal remedies doctrine and the closely related issues of tribal court jurisdiction over questions of federal law and tribal law. The Fallon Tribe submits this brief to help guide the Court's decision on the proper scope and application of principles of federal Indian law on these issues.

---

[1] Pursuant to Rule 37.3(a), Counsel for Petitioners and Counsel for Respondents consent to the filing of the Brief of *Amicus Curiae*. Their letters are submitted for filing herewith. Pursuant to Rule 37.6, no counsel for a party authored this Brief in whole or in part, and no person or entity, other than *amicus curiae*, monetarily contributed to the Brief.

SUMMARY OF ARGUMENT

As a general rule, tribal courts may hear claims and defenses arising under federal law and those arising under tribal law. This authority is among the sovereign powers of tribes over their lands that this Court, Congress, and the Executive Branch have consistently recognized and protected. Whether Congress has foreclosed tribal authority over specific federal law or tribal law claims is an inquiry to be resolved on a case-by-case basis pursuant to well-established principles of federal Indian law such as the exhaustion of tribal remedies doctrine. Absent clear congressional foreclosure, tribal jurisdiction exists and may be exercised by the separate tribal sovereigns, at least when it is invoked by parties injured on tribal lands.

ARGUMENT

I. UNLESS CONGRESS PROVIDES OTHERWISE, TRIBAL COURTS HAVE AUTHORITY OVER CLAIMS ARISING UNDER FEDERAL LAW

In a long line of cases from *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831) to *Kiowa Tribe of Oklahoma v. Manufacturing Tech., Inc.*, 118 S.Ct. 1700 (1998), this Court has established the fundamental principles of federal Indian law: Indian tribes are sovereigns, their sovereignty is inherent, and their sovereignty exists unless and until it has been divested by Congress. "The powers of Indian tribes are, in general, *'inherent powers of a limited sovereignty which has never been extinguished.'* " *United States v. Wheeler*, 435 U.S. 313, 322 (1978), *quoting* Felix S. Cohen,

Handbook of Federal Indian Law 122 (1945 ed.) (emphasis in original).

> [T]he conception of Indian sovereignty that this Court has consistently reaffirmed . . . [is that] Indian tribes within 'Indian country' are a good deal more than 'private, voluntary organizations.' They 'are unique aggregations possessing attributes of sovereignty over both their members and their territory.'

Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 140 (1982), *citing United States v. Mazurie*, 419 U.S. 544, 547 (1975).

Most recently, the Court affirmed that "tribes retain considerable control over nonmember conduct on tribal land." *Strate v. A-1 Contractors*, 520 U.S. 438, 117 S.Ct. 1404, 1413 (1997), *citing Montana v. United States*, 450 U.S. 544, 557 (1981). It is undisputed that the relevant events in the present case occurred on tribal land. J.A. 87a-88a n.5. Thus, as the United States aptly recognizes, this case presents no claim of territorial limits on tribal sovereignty, Brief for U.S. at 8-9 & 11-13, but rather "falls squarely within the heartland of tribal sovereignty. . . . " *id.* at 12.

When discussing tribal sovereignty, this Court has often endorsed the importance of tribal courts. *E.g., Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 14-15 (1987) ("Tribal courts play a vital role in tribal self-government, and the Federal Government has consistently encouraged their development."); *National Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845 (1985) (tribal court jurisdiction over non-Indian defendants in the civil area, as opposed to the criminal area, is not inconsistent with overriding national interests); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 65

(1978) ("Tribal courts have repeatedly been recognized as appropriate forums for the exclusive adjudication of disputes affecting important personal and property interests of both Indians and non-Indians."); *Williams v. Lee*, 358 U.S. 217 (1959) (tribal court jurisdiction over civil claims arising on a reservation and brought by non-Indians against Indians is exclusive).[2]

---

[2] Several *amici* in support of Petitioners in the present case broadly assert or imply that tribal courts are biased or incompetent. Such statements ignore this Court's observation more than ten years ago that challenges to tribal court competency contradict "congressional policy," *Iowa Mutual*, 480 U.S. at 19, and the Court's own repeated affirmations of tribal court jurisdiction over both Indians and non-Indians, *e.g., Santa Clara Pueblo v. Martinez*, 436 U.S. at 65-66.

As this Court recognized in *Santa Clara Pueblo*, tribal courts are bound by the Indian Civil Rights Act, 25 U.S.C. §§ 1301-1303, which guarantees, *inter alia*, the due process and equal protection rights of both Indians and non-Indians. 436 U.S. at 60-61. Since *Santa Clara Pueblo*, Congress and the Executive Branch have examined in depth the fairness and competency of tribal courts nationwide. *See* Enforcement of the Indian Civil Rights Act: Hearing before the United States Commission on Civil Rights, 100th Cong., 2d Sess. (1988); the Indian Civil Rights Act: A Report of the United States Commission on Civil Rights (June, 1991). In virtually every session, Congress considers legislation affecting tribal courts. *E.g.*, S. 2747, 100th Cong. (1988) (to provide federal court authority to enforce rights secured by the Indian Civil Rights Act); S. 1752, 102d Cong. (1991) (to provide for the development, enhancement, and recognition of Indian tribal courts); H.R. 1268, 103d Cong. (1993) (to assist the development of tribal judicial systems).

The most recent culmination of this process is the Indian Tribal Justice Act, 25 U.S.C. §§ 3601-3631 (1993), wherein Congress, rather than curtailing tribal court jurisdiction, authorized important additional financial and technical resources

Even where some claims could arguably be brought in non-tribal forums, the Court has held that they nevertheless must be brought in tribal courts, at least in the first instance. This may be due to rules of law, *e.g., Williams v. Lee*, 358 U.S. at 223 (tribal jurisdiction over on-reservation claims brought by non-Indians against Indians is exclusive), or rules of comity, *e.g., National Farmers Union*, 471 U.S. at 856-857 (the tribal exhaustion doctrine). These rules are predicated on tribal sovereignty, as the Court has recognized. State and federal court jurisdiction "over Indians or activities on Indian lands would interfere with tribal sovereignty and self-government. . . . " *Iowa Mutual*, 480 U.S. at 15; *accord Santa Clara Pueblo v. Martinez*, 436 U.S. at 59 ("providing a federal forum for issues arising under . . . [federal law] constitutes an interference with tribal autonomy and self-government beyond that created by . . . [substantive federal law applied to tribes]").

The present case, *inter alia*, invites this Court to review whether tribal courts may hear claims arising

---

for its effective exercise. Since then, Congress has increasingly recognized the stature and sophistication of tribal courts. *E.g.*, the Violent Crime Control and Law Enforcement Act 1994, Pub. L. 103-322, *codified at* 18 U.S.C. § 2265 (requiring that tribes and states accord full faith and credit to tribal court stalking and domestic violence orders); the Deadbeat Parents Punishment Act of 1998, Pub. L. 105-187, *codified at* 18 U.S.C. §§ 225-228 (making it a federal felony to violate tribal court child support obligation orders). Such comprehensive congressional assistance and recognition foreclose any concern that tribal courts are not up to the tasks that Congress and this Court have secured for them.

under federal law. Brief for Pets. at 35.[3] This question is easily answered in the affirmative because tribal court power to determine various matters of federal law is well-established. *E.g., National Farmers Union*, 471 U.S. at 852-857 (questions of federal common law); *Santa Clara Pueblo v. Martinez*, 436 U.S. at 65 (claims under a federal statute).[4] Congress agrees that tribal courts may interpret and enforce federal statutory rights. *E.g.*, the Indian Child Welfare Act, 25 U.S.C. §§ 1901-1925; the Indian Civil Rights Act, 25 U.S.C. §§ 1301-1303. The Executive Branch

[3] In the present case, no argument is made that tribal court jurisdiction over the federal law claims is exclusive. Thus, the *Amici* States in support of Petitioners point, Brief at 2, about "an unbalanced playing field" is as inappropriate in the present context as it is in the civil rights context where no argument of exclusivity was made.

[4] The *Amici* States, Brief at 4 & 14, also make a sweeping contention – without any citation – that "tribal courts have inherent authority only to apply tribal law." The States point out that tribes preceded the existence of federal law. *Id.* at 15. But it is commonplace for sovereigns to deal with things subsequent. *See, e.g., Medtronic, Inc. v. Lohr*, 518 U.S. 470, 475 (1996) (discussing the evolution of public health regulation "[a]s technologies advanced . . . from bedpans to brainscans. . . . "); *accord Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 430 (1984) ("Repeatedly, as new [copyright] developments have occurred in this country, it has been the Congress that has fashioned the new rules that new technology made necessary").

This Court clearly recognizes adjudicatory jurisdiction as an element of inherent tribal sovereignty even though "[t]ribal courts in the Anglo-American mold were [historically] virtually unknown." *Iowa Mutual*, 480 U.S. at 17; *accord National Farmers Union*, 471 U.S. at 851. In any event, the proper analysis is whether Congress has taken away tribal power over federal law, not whether tribes have such power, because "the power . . . derives from sovereignty itself." *Merrion*, 455 U.S. at 147.

has stated in this litigation that tribal courts "are presumed competent to adjudicate claims arising under any source of law, including federal law, in the absence of a contrary congressional determination." Brief for U.S. at 22. Many lower federal courts have upheld the power of tribal courts to decide, at least in the first instance, issues of federal law. *E.g., United States v. Plainbull*, 957 F.2d 724 (9th Cir. 1992) (trespass to Indian land issues, 25 U.S.C. § 179); *Smith v. Moffett*, 947 F.2d 442 (10th Cir. 1991) (civil rights claims); *Calumet Gaming Group-Kansas, Inc. v. Kickapoo Tribe of Kansas*, 987 F. Supp. 1321 (D. Kan. 1997) (Federal Arbitration Act issues, 9 U.S.C. § 2); *Prescott v. Little Six, Inc.*, 897 F. Supp. 1217 (D. Minn. 1995) (Employee Retirement Income Security Act claims, 29 U.S.C. §§ 1001-1132); *Middlemist v. Lujan*, 824 F. Supp. 940 (D. Mont. 1993), *aff'd without opinion*, 19 F.3d 1318 (9th Cir. 1994), *cert. denied*, 513 U.S. 961 (1994) (federal Indian law issues).

This "commonly shared presumption of Congress, the Executive Branch, and lower federal courts . . . [regarding tribal power over federal law issues] . . . carries considerable weight." *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 206 (1978); *accord Merrion*, 455 U.S. at 139 ("viewing the taxing power of Indian tribes as an essential instrument of self-government and territorial management has been a shared assumption of all three branches of the Federal Government"). Indeed, it should be the starting point for the Court's opinion in this case. "[U]nless and until Congress makes clear its intention . . . " to divest tribal jurisdiction, *Santa Clara Pueblo v. Martinez*, 436 U.S. at 72, El Paso's assertion, Brief for Pets. at 35, that Congress has not authorized tribal jurisdiction,

is irrelevant. Tribal power over federal claims derives from the sovereignty of tribes and their status in the federal system and does not depend on a delegation of federal power. *Wheeler*, 435 U.S. at 323; *accord National Farmers Union*, 471 U.S. at 851 (many tribal rights today enjoy the protection of federal law in addition to their origins in tribal sovereignty); *see also* Felix S. Cohen, *Handbook of Federal Indian Law* 232 (1982 ed.) ("Indian tribes consistently have been recognized . . . as distinct, independent political communities qualified to exercise powers of self-government, not by virtue of any delegation of powers, but rather by reason of their original tribal sovereignty.") (footnotes omitted).[5]

Additionally, as the United States argues, tribal power over federal claims includes the power over federal law defenses as in the present case. "In the absence of a contrary congressional determination, tribal courts, no less than state courts, are presumed competent to decide questions of federal law, including preemption [defenses]." Brief for U.S. at 10 (footnote omitted); *see also Pratt v. Paris Gaslight & Coke Co.*, 168 U.S. 255, 259 (1897);

---

[5] El Paso's point, Brief for Pets. at 2 n.2, echoed by its *amicus* National Mining Association, that, until recently, the Navajo Nation had not "claimed" or exercised its full jurisdiction over civil actions involving non-Indians, is inapposite. Tribes do not lose their sovereign powers through non-use. *Merrion*, 455 U.S. at 148 ("Without regard to its source, sovereign power, even when unexercised, is an enduring presence that . . . will remain intact unless surrendered in unmistakable terms."). This Court in *Merrion* specifically noted that amended tribal laws are relevant to whether an exercise of jurisdiction has been "*effectuate*[d]," not whether jurisdiction exists. *Id.* at n.14 (emphasis in original).

Will v. Calvert Fire Ins. Co., 437 U.S. 655, 660 n.3 & 666 (1978) (plurality opinion) (defenses which would otherwise fall within the exclusive jurisdiction of federal courts may be raised in state court proceedings). To hold otherwise would severely undermine tribal sovereignty, including the tribal exhaustion doctrine, which this Court established, *inter alia*, to "[p]romot[e] . . . tribal self-government and self-determination." *Iowa Mutual*, 480 U.S. at 15.[6]

II. ADDITIONALLY, UNLESS CONGRESS PROVIDES OTHERWISE, TRIBES HAVE THE POWER TO PROVIDE LEGAL REMEDIES UNDER TRIBAL LAW FOR CIVIL WRONGS COMMITTED WITHIN THEIR TERRITORY

This Court recognizes that federal law and tribal law are separate bodies of law. In *Wheeler*, the Court refused to find that the federal constitutional double jeopardy clause barred federal prosecution of an Indian following a tribal prosecution. 435 U.S. at 329-330. The sovereigns were separate and so, therefore, was the source of their power to prosecute. *Id.* at 330. Equally, then, federal law and tribal law are distinct and independent sources of

---

[6] To ensure uniformity, the right to federal court review of tribal court interpretations of federal law is appropriate. *See National Farmers Union*, 471 U.S. at 856 (suggesting that, in addition to federal court review of tribal jurisdictional determinations, federal courts may review the merits of claims exhausted in tribal court); *see also Iowa Mutual*, 480 U.S. at 19 (such review should be deferential, not a "relitigation" of non-jurisdictional issues "raised . . . and resolved in the Tribal Courts").

law. *See also National Farmers Union*, 471 U.S. at 851 ("federal law defines the outer boundaries of an Indian tribe's power over non-Indians"); *Iowa Mutual*, 480 U.S. at 16 (some challenges to tribal jurisdiction present issues of purely tribal law). The lower federal courts uniformly have followed this distinction. *See, e.g., Basil Cook Enter., Inc. v. St. Regis Mohawk Tribe*, 117 F.3d 61, 66-68 (2nd Cir. 1997); *City of Timberlake v. Cheyenne River Sioux Tribe*, 10 F.3d 554, 559 (8th Cir. 1993), *cert. denied*, 512 U.S. 1236 (1994); *Romero v. Peterson*, 930 F.2d 1502, 1506 (10th Cir. 1991); *Sanders v. Robinson*, 864 F.2d 630, 633 (9th Cir. 1988), *cert. denied*, 490 U.S. 1110 (1989).

Thus, unless foreclosed by Congress, in addition to their power to hear claims arising under federal law, tribes "have the power to make their own substantive law . . . and to enforce that law in their own forums." *Santa Clara Pueblo v. Martinez*, 436 U.S. at 55-56, *citing, inter alia, Williams v. Lee*, 358 U.S. 217 (1959). Like the power to prosecute, *Wheeler*, 435 U.S. at 323-330, the power to provide tribal law civil remedies emanates from a tribe's "own retained sovereignty." *Id.* at 324. Indeed, it is an essential part of tribal sovereignty. "The cases in this Court have consistently guarded the authority of Indian governments over their reservations," and in particular, "the authority of the tribal courts over Reservation affairs." *Williams v. Lee*, 358 U.S. at 223; *see also Merrion*, 455 U.S. at 137-138 (governmental services are among "the advantages of a civilized society that are assured by the existence of tribal government."). "[T]he congressional policy promoting the development of tribal courts," *Iowa Mutual*, 480 U.S. at 19, includes the recent and specific reaffirmance that "tribal justice systems are

an essential part of tribal governments and serve as important forums for ensuring public health and safety and the political integrity of tribal governments." The Indian Tribal Justice Act of 1993, 25 U.S.C. § 3601(5).

This conclusion is also buttressed by notions of sovereignty outside the area of federal Indian law. A sovereign's authority to adjudicate civil disputes arising within its territory is so integral to the definition of sovereignty that it has become one of "the most firmly established principles of . . . jurisdiction in American tradition." *Burnham v. Superior Court*, 495 U.S. 604, 610 (1990) (plurality opinion). This is so particularly with respect to torts, an area of common law traditionally addressed through judicial fora. *See* Judge Robert E. Keeton, *Part I: The Changing Lives of Professionals in Law*, 37 Ariz. L.Rev. 419 (1995) ("on the subject matter of tort law, courts come to mind as historically the principal lawmakers, using the common law process"); *see also Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 776 (1984) ("A state has an especial interest in exercising judicial jurisdiction over those who commit torts within its territory."); *Watson v. Employers Liab. Assurance Corp.*, 348 U.S. 66, 72 (1954) (states manifest their "natural interest in the injured by providing remedies for recovery of damages").

Acknowledging that tribes may provide tort law generally is consistent with the many cases upholding various exercises of tribal sovereignty by tribal law and regulation. *E.g., Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*, 492 U.S. 408, 438-444 (1989) (plurality opinion) (tribe can zone and regulate land use of non-Indian land); *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 337-338 (1983) (tribe can regulate hunting

and fishing of non-Indians); *Merrion*, 455 U.S. at 144 (tribe can tax oil and gas severance by non-Indians);[7] *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980) (tribes can tax cigarette purchases by non-members, including non-Indians).

Congress has not generally divested this tribal power, at least where tribal members have been harmed on Indian land. "[U]ntil Congress acts, the tribes retain their existing sovereign powers." *Wheeler*, 435 U.S. at 323; *accord Williams v. Lee*, 358 U.S. at 223 ("If this power is to be taken away from them, it is for Congress to do it."); *Santa Clara Pueblo v. Martinez*, 436 U.S. at 60 ("a proper respect both for tribal sovereignty itself and for the plenary authority of Congress in this area cautions that we tread lightly in the absence of clear indications of legislative intent."). "Because the Tribe retains all inherent attributes of sovereignty that have not been divested by the Federal Government, the proper inference from silence . . . is that the sovereign power . . . remains intact." *Merrion*, 455 U.S. at 149 n.14.[8]

---

[7] Significantly, in *Merrion*, the Court held that "the Tribe's authority to tax non-Indians who conduct business on the reservation does not simply derive from the Tribe's power to exclude such persons, but is an inherent power necessary to tribal self-government and territorial management." 455 U.S. at 141.

[8] In the present case, the tribal interest in providing legal remedies under tribal law is heightened by El Paso's choosing to enter the reservation and do business there pursuant to leases with a tribe. *See Montana*, 455 U.S. at 565 (even on non-Indian fee lands, "Indian tribes retain inherent sovereign power . . . [to] . . . regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with a tribe or its members through commercial dealing, contracts, leases, or other arrangements."); *see also Colville*, 447 U.S. at 153-154 (tribes retain inherent authority to tax "non-Indians entering the reservation to engage in economic activity.").

CONCLUSION

For the reasons stated above, the decision of the Court of Appeals should be affirmed.

RESPECTFULLY SUBMITTED this 14th day of January, 1999.

MELODY L. MCCOY*
KIM JEROME GOTTSCHALK
NATIVE AMERICAN RIGHTS FUND
1506 Broadway
Boulder, Colorado 80302
(303) 447-8760

Counsel of Record for Amicus Curiae

Supreme Court, U.S.
FILED
JAN 14 1999
CLERK

No. 98-6

In The

Supreme Court of the United States

October Term, 1998

EL PASO NATURAL GAS COMPANY, *et al.*,

Petitioners,

v.

LAURA NEZTSOSIE, *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF THE NAVAJO NATION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

NAVAJO NATION DEPARTMENT OF JUSTICE
BRITT E. CLAPHAM, II
Acting Attorney General
STEVEN J. BLOXHAM, Staff Attorney
LUTALENE D. TAPAHE, Staff Attorney
TERENCE M. GURLEY,* Staff Attorney
P.O. Drawer 2010
Window Rock, Navajo Nation
(AZ) 86515
(520) 871-6347

**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (602) 342-2831

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether the Navajo Nation courts retain, in the first instance, jurisdiction to determine jurisdiction over a tort committed by a uranium mining company against a Navajo on Navajo trust land.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

INTEREST OF THE *AMICUS CURIAE* 1

STATEMENT OF FACTS 2

SUMMARY OF ARGUMENT 2

ARGUMENT 3

A. THE LONGSTANDING RULE OF INDIAN LAW PROHIBITING IMPLICIT DIVESTITURE OF TRIBAL SOVEREIGNTY MANDATES THAT THE NAVAJO NATION'S JUDICIAL AUTHORITY REMAINS INTACT BECAUSE IT HAS NOT BEEN *EXPRESSLY* EXTINGUISHED 3

B. THE NAVAJO NATION JUDICIAL SYSTEM HAS A HIGHLY DEVELOPED AND SOPHISTICATED STRUCTURE WITH AN INTERNATIONAL REPUTATION FOR FAIRNESS AND INTEGRITY, FULLY CAPABLE OF DETERMINING JURISDICTIONAL MATTERS IN THE FIRST INSTANCE 10

1. This Court Has Endorsed The Competence Of The Navajo Nation Judicial System 10

2. The Navajo Judiciary Has Consistently Guaranteed Due Process To Litigants 12

3. The Navajo Nation's Reputation For Fairness Has Been Acknowledged By The Non-Indian Business Community 18

4. Navajo Nation Courts Have The Proven Capability To Analyze Complex Federal Issues Including Preemption 19

CONCLUSION 21

TABLE OF AUTHORITIES

Page

CASES

Atkinson Trading Co. v. Navajo Nation, 866 F. Supp. 506 (D. N.M. 1994) 11

Authier v. Ginsburg, 757 F.2d 796 (6th Cir. 1985) 20

Dennison v. Tucson Gas and Electric Co., 1 Nav. L. Rep. 95 (Nav. Ct. App. 1974) 16, 17

In Re Estate of Jumbo, 17 Indian L. Rptr. 6042 (Nav. Sup. Ct. 1990) 19

In the Matter of BHP Minerals, Inc., Navajo Tax Commission Case No. 85-001, slip op. (Aug. 5, 1994) 19

Iowa Mutual Ins. Co. v. LaPlante, 480 U.S. 9 (1987) ... 6, 7

Kerr-McGee Corp. v. Farley, 115 F.3d 1498 (10th Cir. 1997) 9

Kerr-McGee Corp. v. Navajo Tribe, 471 U.S. 195 (1985) 10

Largo v. Gregory & Cook, Inc., 22 Indian L. Rptr. 6040 (Nav. Sup. Ct. 1995) 17

Marshal v. Chase Manhattan Bank, 558 F.2d 680 (2nd Cir. 1977) 20

Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982) 6

Montana v. United States, 450 U.S. 544 (1981) 3, 4, 9

National Farmers Union Ins. Co. v. Crow Tribe of Indians, 471 U.S. 845 (1985) 5, 7, 9

Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978) 14

Pela v. Peabody Coal Company, 17 Indian L. Rptr. 6132 (Nav. Sup. Ct. 1990) 20, 21

TABLE OF AUTHORITIES – Continued

Page

Reservation Business Services v. Albert, 22 Indian L. Rptr. 6102 (Nav. Sup. Ct. 1995) 17

Rough Rock Community School v. Navajo Nation, No. SC-CV-06-94, slip. op. (Nav. Sup. Ct. Mar. 14, 1996) 17

Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978) ...7, 8

Strate v. A-1 Contractors, 520 U.S. 438 (1997)..... 4, 7, 8

TBI Contractors v. The Navajo Tribe of Indians, 16 Indian L. Rptr. 6017 (Nav. Sup. Ct. 1988) 17

Williams v. Lee, 358 U.S. 217 (1959)..... 10

STATUTES AND TREATIES

1 N.N.C. § 3 17

7 N.N.C. § 201 11

7 N.N.C. § 204(A) 19, 20

7 N.N.C. § 253 .....11, 12

7 N.N.C. § 254 12

7 N.N.C. §§ 301 and 302..... 12

25 U.S.C. § 631..... 10

29 U.S.C. § 1132(a)(1)(B) 20

42 U.S.C. §§ 10169, 10175, 10191 and 10199 8

Curtis Act of June 6, 1898, ch. 517, § 28, 30 Stat. 495..... 8

Federal Employee's Group Life Insurance Act, 5 U.S.C. § 8705(a) 20

TABLE OF AUTHORITIES – Continued

Page

H.R. Rep. No. 78, 91st Cong., 1st Sess., 8 (1969)..... 10

Indian Civil Rights Act, 25 U.S.C. §§ 1301 *et seq.* ...13, 16

Indian Tribal Justice Act of December 3, 1993, P.L. 103-176, 107 Stat. 2004, 25 U.S.C. § 3601 .....5, 14

Navajo and Hopi Rehabilitation: Hearing Before Subcommittee on Indian Affairs of the Committee on Public Lands on H.R. 3476, 81st Cong., 1st Sess. (1949) 10

Navajo Nation Bill of Rights, 1 N.T.C. § 3 18

Navajo Tribal Council Resolution No. CAP-22-86 (Apr. 25, 1986) 18

Navajo Tribal Council Resolution No. CJA-5-59 (Jan. 9, 1959) 10

Navajo Tribal Council Resolution No. CJA-18-60 (Jan. 22, 1960), *as amended*, 16 N.N.C. §§ 1401-1403 16

Navajo Tribal Council Resolution No. CO-63-67 (Oct. 9, 1967), *as amended*, 1 N.N.C. §§ 1-9 16

Navajo Tax Commission Resolution No. TAX-86-0036 (Sept. 26, 1986)..... 19

Navajo Tribal Council Resolution No. CD-68-89 (Dec. 15, 1989) 15

Navajo Tribal Council Resolution No. CD-94-85 (Dec. 4, 1985) 15

S.1407, 81st Congress, 1st Sess. § 9 (reprinted at 95 Cong. Rec. H. 13659-60 (Oct. 3, 1949)); S. Doc. No. 119, 81st Cong., 1st Sess. 2 (1949) 10

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES

Aboriginal Rights: Western United States of America, 2 Law & Anth. 195 (1987) 11

Civil Rights in Indian Country: Tribal Court Decisions 1988-92 (Apr. 30, 1993) 13

Developing a Tribal Common Law Jurisprudence: The Navajo Experience 1969-1992, 18 Am. Indian L. Rev. 379 (1994) 12

"Lawyers as Peacemakers: Our Navajo Nation Peers Could Teach Us a Thing or Two about Conflict Resolution," *ABA Journal* 6 (Dec. 1995) 15

Life Comes from it: Navajo Justice Concepts, 24 N.M. L. Rev. 175 (1994) 11

"O'Connor Says Tribal Courts Offer Lessons," 12 *American Indian Report* 10 (July 1996)..... 15

The Process of Decision Making in Tribal Courts, 31 Ariz. L. Rev. 225 (1989)..... 12

"Tribal Justice Systems," in D. Getches, C. Wilkinson & R. Williams, *Federal Indian Law* 493-550 (3d Ed. 1993)..... 13

American Indian Policy Review Commission, *Final Report* 167 (1977)..... 14

Frye, *Lender Recourse in Indian Country: A Navajo Case Study*, 21 N.M. L. Rev. 275 (1991)..... 18

Lessons from the Third Sovereign: Indian Tribal Courts (June 4, 1996) 15

TABLE OF AUTHORITIES – Continued

Page

National Indian Justice Center, *"Tribal Court Report"* (Sept. 1996)..... 15

Nell Jessup Newton, *Tribal Court Praxis: One Year in the Life of Twenty Indian Tribal Courts*, 22 Am. Indian L. Rev. 285 (1998) 14

R. Young, *Navajo Yearbook (1961)* 10

Tribal Courts Act of 1991 and Report of the U.S. Commission on Civil Rights entitled "Indian Civil Rights Act": Hearing Before the Senate Select Committee on Indian Affairs, 102d Cong., 1st Sess. 9 (1991) 14

INTEREST OF THE *AMICUS CURIAE*

The interest of the Navajo Nation is self-evident.

Navajos were injured on Navajo Nation trust land. The land had been commercially leased to Petitioner (or its predecessor), but the land was always, and remains to this day, owned by and within the borders of the Navajo Nation, under its direct supervision and control.

The subject site and all similar mining locations are currently under the direct maintenance of, and being cleaned up by, the Navajo Nation.

It is the Navajo Nation's sovereignty which Petitioners attack when they challenge the Navajo Nation's jurisdiction to decide jurisdiction.

This attack on our judiciary and sovereignty violates established federal law.

This *amicus* brief of the Navajo Nation does not presume to address the underlying merits, nor whether Navajo Nation courts in fact *have* jurisdiction (nor, to some extent, whether Price-Anderson applies at all). Rather, our only point is that Navajo Nation sovereignty requires that our judiciary have its proper and necessary first opportunity to determine jurisdiction.[1]

---

[1] The parties have consented to the filing of this brief by the Navajo Nation. The consents have been filed with the Clerk pursuant to Rule 37.3 of the Rules of the Court.

Pursuant to Rule 37.6 of the Rules of this Court, *amicus* states that no counsel for a party has authored this brief in whole or in part, and that no person or entity, other than *amicus*, has made a monetary contribution to the preparation or submission of this brief.

STATEMENT OF FACTS

The Navajo Nation is a federally recognized Indian tribe and is the largest such tribe in the United States, comprised of more than 200,000 members and occupying over 25,000 square miles of trust lands within three states, Arizona, New Mexico and Utah. The present Navajo government structure is in three branches: Executive, Legislative and Judicial. The Executive Branch includes the President of the Navajo Nation, the Vice President, and appointed officials overseeing 10 divisions and several offices. The Legislative Branch consists of the Speaker of the Council and the Navajo Nation Council comprised of 88 elected council delegates representing 110 chapters. The Judicial Branch includes the Chief Justice and the Navajo Nation trial and appellate courts. Elections for the President and the delegates are held every four years in November.

The Navajo Nation hereby adopts and incorporates by reference the "Statement of the Case" as presented in Respondents' Brief in Opposition to Petition (p. 1-3) filed with this Court.

SUMMARY OF ARGUMENT

This case at this juncture is about one thing: established Indian law exhaustion principles require that the Navajo Nation Supreme Court simply be permitted, in the first instance, to exercise jurisdiction to determine jurisdiction.

If Price-Anderson applies, defendants like petitioners have an automatic right to remove "any action" to federal court. Notice of Removal was not filed in this case.

Rather, petitioners unsuccessfully moved to dismiss the action then pending in the district court of the Navajo Nation. At that point, they sought injunctive federal relief, essentially denied by the federal trial court and the Court of Appeals.

Petitioners' present argument is defeated by the established rule that Congressional divestiture of Indian court jurisdiction must be express, not implied. Even assuming *arguendo* the theoretical validity of Petitioners' claim, it nevertheless fails because both *Montana* exceptions apply.

In addition, the Navajo Nation judiciary has been recognized by this Court and numerous federal and state appellate courts for a well-deserved reputation for fairness, competence and integrity. Coupled with the overriding issues of Navajo Nation sovereignty at stake, the Navajo judiciary is thus fully capable of exercising jurisdiction to determine jurisdiction.

ARGUMENT

A. THE LONGSTANDING RULE OF INDIAN LAW PROHIBITING IMPLICIT DIVESTITURE OF TRIBAL SOVEREIGNTY MANDATES THAT THE NAVAJO NATION'S JUDICIAL AUTHORITY REMAINS INTACT BECAUSE IT HAS NOT BEEN *EXPRESSLY* EXTINGUISHED.

In *Montana v. United States*, this Court articulated a rule governing the authority of tribes over non-member

conduct on the reservation. This "general proposition [is] that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe." *Montana v. United States*, 450 U.S. 544, 565 (1981). However, *Montana's* rule does not apply in Petitioners' case because their activities took place on Navajo Nation trust land.[2]

But even if *Montana* governs, there are two exceptions to its general rule which apply: 1) when a nonmember enters into a consensual relationship with the Indian tribe or its members, and 2) when the conduct of the non-member threatens or has some direct effect on the health or welfare of the tribe.

These Petitioners entered into a consensual leasehold relationship with the Navajo Nation to conduct business for profit on Navajo Nation trust land. In addition, Petitioners' alleged harmful activity threatened the health and welfare of the Navajo community (tribal members and non-members alike). There is no dispute that the Navajo Nation has continued to exercise governmental

---

[2] "Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians *on their reservations*, . . . " *Montana*, at 510 (*emphasis added*). In *Strate v. A-1 Contractors*, 520 U.S. 438, 117 S.Ct. 1404 (1997) this Court clarified: "*Montana* thus described a general rule that, absent a different congressional direction, Indian tribes lack civil authority over the conduct of non-members *on non-Indian land* within a reservation, . . . " *Strate*, 117 S.Ct. at 1409 (*emphasis added*). This Court went on to say "We 'can readily agree,' in accord with *Montana*, that tribes retain considerable control over non-member conduct *on tribal land*." *Strate*, 117 S.Ct. at 1413 (*citation omitted*) (*emphasis added*).

control over the mine sites. *See* Joint Appendix 88A, note 5. Thus, the Navajo Nation's sovereign authority is retained and needs no affirmative delegation from Congress.

In addition to this Court's jurisprudence regarding retained inherent sovereignty of Indian tribes, Congress has found that "Indian tribes possess the inherent authority to establish their own form of government, including tribal justice systems [which] are an essential part of tribal governments and serve as important forums for ensuring public health and safety and the political integrity of tribal governments."[3]

---

[3] Indian Tribal Justice Act, P.L. 103-176, H.R. Conf. Rep. No. 383, 103rd Cong., 1st Sess. 1993 (Nov. 19, 1993).

This Court has concurred: "We have repeatedly recognized the Federal Government's longstanding policy of encouraging tribal self-government. . . . This policy reflects the fact that Indian tribes retain 'attributes of sovereignty over both their members and their territory', . . . to the extent that sovereignty has not been withdrawn by federal statute or treaty. . . . Tribal courts play a vital role in tribal self-government . . . and the Federal Government has consistently encouraged their development. . . . A federal court's exercise of jurisdiction over matters relating to reservation affairs can also impair the authority of tribal courts as we recognized in *National Farmers Union*. . . . Promotion of tribal self-government and self-determination require(s) that the Tribal Court have the 'first opportunity to evaluate the factual and legal bases for the challenge' to its jurisdiction. . . . Regardless of the basis for jurisdiction, the federal policy supporting tribal self-government directs a federal court to stay its hand in order to give the tribal court a 'full opportunity to determine its own jurisdiction' . . . proper respect for tribal legal institutions requires that they be given a 'full opportunity' to consider the issues before them and 'to rectify any errors'. . . . The federal

Contrary to Petitioners' contentions, neither the jurisdictional provisions in the Price-Anderson Amendments Act, nor the federal regulatory scheme governing nuclear activity, divest the Navajo Nation of this retained sovereign authority.[4] In *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9 (1987) this Court clearly announced "[C]ivil jurisdiction . . . presumptively lies in the tribal courts unless *affirmatively limited* by a specific . . . federal statute. . . . '[T]he proper inference from silence is that the sovereign power . . . remains intact.' " *Id.* at 18 (*emphasis added*) *quoting with approval Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982).

---

policy of promoting tribal self-government encompasses the development of the entire tribal court system, including appellate courts. At a minimum, exhaustion of tribal remedies means that tribal appellate courts must have the opportunity to review the determinations of the lower tribal court." *Iowa Mutual*, 94 L.Ed. 2d at 18 *et seq.* (*citations and footnotes omitted*).

[4] Petitioners erroneously *assumed* that Price Anderson does not anticipate removal from Navajo Nation courts and never filed a Notice of Removal. This is clearly wrong since the statute expressly states that " . . . *any* such action pending on the date of . . . enactment [Aug. 20, 1988] . . . *shall* be removed (upon motion of Defendant)" (*emphasis added*). Had Petitioners filed a Notice of Removal, they would have automatically put themselves in front of a federal judge (where they wanted to be), but without violating this Court's established Indian law exhaustion principles. Statutory silence presumes Navajo Nation court jurisdiction. In turn, this is automatically subject to removal, but only if the Defendant so elects. Petitioner had the option to remove but did not take it. Rather, they merely unsuccessfully moved to dismiss and then sought federal injunctive relief, bypassing their enunciated statutory right.

Likewise, in *National Farmers Union Ins. Co. v. Crow Tribe of Indians*, 471 U.S. 845 (1985), as later ratified in note 7 of *Strate v. A-1 Contractors*, 520 U.S. 438 (1997), this Court supported exhaustion of Indian court jurisdiction, although wisely noted that the exhaustion rule must yield under three precise exceptions: (1) harassment/bad faith; (2) *express* jurisdictional prohibition; or (3) futility due to inadequate appellate review, none of which apply to the Navajo Nation in this case.

Importantly, Petitioner in *Iowa Mutual* made an argument analogous to the "federal homogeneity for nuclear torts" contention that Petitioners and their corporate *amici* offer here that the federal statutory grant of diversity jurisdiction overrode the clear and oft-enunciated federal policy of deference to tribal courts. Neither of these arguments is sufficient to overcome the paramount federal Indian policy of deference. This Court was unpersuaded in *Iowa Mutual* and should remain steadfast here, since the exhaustion rule and Congress' policy of promoting tribal judicial systems complement each other and serve as the foundation of tribal sovereignty.

Fundamentally, sovereignty is the right and exercise of a people to make and live by their own law. It is this very sovereignty, this "tribal self-government", which longstanding federal policy has encouraged and nurtured through a sovereign-to-sovereign relationship which is very distinct from the federal relationship to the fifty states.

This is because (a) the power of the federal government flows *from* the States and their people via the Constitutional Convention and its inspired and historic

result; (b) the States as political entities are already sufficiently and adequately evolved and do not need such special encouragement; and (c) the States are powerful enough to protect their jurisdictional territory via the very doctrine of federalism.[5]

Yet, on the other hand, Congress has extensive powers over the Navajo Nation and other tribes. This Court has held that tribes can have their jurisdiction limited or even abolished by federal statute. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, at 65 (1978).[6]

Therefore, any such limitation or divestiture must be express, not implied; stated, not presumed.[7] Likewise, it must be remembered that Congress and this Court have evolved a precise and sophisticated process to invigorate the cherished system of checks and balances.[8] Given that

---

[5] Specifically, the Tenth Amendment to the Bill of Rights is a classic enunciation of state reserved power and authority.

[6] It is this very fact of the absolute and extensive power of Congress that requires the federal judiciary to scrupulously and meticulously adhere to the exact words of a statute: a legislature with plenary power need not be coddled by inference nor implication. Its express statement is sufficient: it need not hint, since it can decree.

[7] Congress certainly knows how to do this. *See, e.g.*, Curtis Act of June 6, 1898, ch. 517, § 28, 30 Stat. 495 (expressly abolishing tribal courts in the Indian territory). Specific to the nuclear statutory scheme, Congress also knows when and how it wants to include or exclude Indian Tribes. *See, e.g.*, 42 U.S.C. §§ 10169, 10175, 10191 and 10199.

[8] *E.g., Duro* and the "*Duro* fix" as referenced in *Strate, supra*, at note 5; and, conversely, *Martinez, supra*, and the telling lack of congressional response.

Congress knows[9] the rule that jurisdictional limitations must be express not implied, and that Congress well knows how to express itself explicitly (*see* note 7, *supra*), this Court should leave it to Congress to respond legislatively, if it sees fit, to this Court's principled and plain reading of the Price-Anderson Amendments Act.

Petitioners wish to turn the longstanding exhaustion rule on its head by arguing that a statute, silent as to tribal judicial power, nevertheless extinguishes the Navajo Nation's sovereign authority to determine in the first instance its own jurisdiction over a dispute which arose on Navajo Nation trust land. The Navajo Nation urges this Court to reject that notion, as the Tenth Circuit did in *Kerr-McGee Corp. v. Farley*, 115 F.3d 1498 (10th Cir. 1997), where it found that the exhaustion presumption does apply in cases involving the Price-Anderson Amendments Act. "Given Price-Anderson's silence, civil jurisdiction over the activities of non-Indians on reservation land should be presumed to lie with the tribal court even if Congress has chosen to federalize the substantive law governing those activities." *Farley*, 115 F.3d at 1502.

---

[9] It is a given that Congress, when it legislates, is aware of this Court's interpretations. *See, e.g.*, note 2 in *Montana v. U.S., supra*, "Congress was, of course, aware of this presumption once it was established by this Court."

B. THE NAVAJO NATION JUDICIAL SYSTEM HAS A HIGHLY DEVELOPED AND SOPHISTICATED STRUCTURE WITH AN INTERNATIONAL REPUTATION FOR FAIRNESS AND INTEGRITY, FULLY CAPABLE OF DETERMINING JURISDICTIONAL MATTERS IN THE FIRST INSTANCE.

1. This Court Has Endorsed The Competence Of The Navajo Nation Judicial System.

As early as 1959, this Court recognized that the Navajo Nation's courts are competent to adjudicate reservation disputes between Navajos and non-Indians. *Williams v. Lee*, 358 U.S. 217 (1959).[10] "The Navajo government has been called 'probably the most elaborate among tribes'. H.R. Rep. No. 78, 91st Cong., 1st Sess., 8 (1969). The legitimacy of the Navajo Tribal Council, the freely elected governing body of the Navajos, is beyond question." *Kerr-McGee Corp. v. Navajo Tribe*, 471 U.S. 195, 200 (1985).[11]

---

[10] The Navajo judiciary had been sponsored and maintained by the Department of the Interior Bureau of Indian Affairs when the Navajo Tribal Council formally transferred Navajo courts over to the Navajo Nation via Navajo Tribal Council Resolution CJA-5-59 (Jan. 9, 1959). R. Young, *Navajo Yearbook (1961)* 285-286.

[11] President Truman vetoed legislation which would have permitted states to exercise concurrent jurisdiction over the Navajo and Hopi reservations. *See* S.1407, 81st Congress, 1st Sess. § 9 (reprinted at 95 Cong. Rec. H. 13659-60 (Oct. 3, 1949)); S. Doc. No. 119, 81st Cong., 1st Sess. 2 (1949) (veto message). Congress then passed the legislation without the provisions that would have allowed state jurisdiction over the allotments. *See* 25 U.S.C. §§ 631, *et seq*. The allotments "of the Navajo reservation" to which Congress referred were those in the Eastern Navajo Agency. *See, e.g.*, Navajo and Hopi Rehabilitation: Hearing Before Subcommittee on Indian Affairs of the Committee on Public Lands on H.R. 3476, 81st Cong., 1st Sess. (1949), at 80, 95, 121, 126, 130 and 261 (referring to Eastern Navajo communities located in a checkerboard area of the Navajo Nation). 7 N.N.C. §§ 201 *et seq*.

Resolution of the jurisdictional issue here requires careful analysis of both federal and Navajo law. Navajo Nation courts are up to the task. "The Navajo Nation has developed a sophisticated judicial system with highly competent jurists." *Atkinson Trading Co. v. Navajo Nation*, 866 F. Supp. 506, 512 (D. N.M. 1994).

The courts of the Navajo Nation have been in continuous operation since the early 1900's. A system of just dispute resolution has existed under the Navajo common law for centuries.[12]

Currently there are seven general jurisdiction District Courts at locations throughout the Navajo Nation,[13] plus a system of specialized, limited jurisdiction courts such as the Family Courts and the world-renowned Peacemaker Courts. The Navajo Nation Supreme Court, sitting at Window Rock, Navajo Nation (Arizona), exercises direct

---

[12] *See, e.g.*, Yazzie, *Life Comes From It: Navajo Justice Concepts*, 24 N.M. L. Rev. 175 (1994); Zion, *Aboriginal Rights: Western United States of America*, 2 Law & Anth. 195 (1987) (World Survey by the International Academy of Comparative Law).

[13] 7 N.N.C. § 253. The District Courts are located at Window Rock, Kayenta, Chinle and Tuba City, Navajo Nation (Arizona) and at Crownpoint, Shiprock and Ramah, Navajo Nation (New Mexico).

or indirect appellate jurisdiction over all matters arising within the Navajo Nation courts and administrative forums.[14]

2. The Navajo Judiciary Has Consistently Guaranteed Due Process To Litigants.

The Navajo Nation courts exercise jurisdiction within the Navajo Nation pursuant to 7 N.N.C. § 254 (territorial jurisdiction) and 7 N.N.C. § 253 (adjudicatory jurisdiction.)

Navajo jurisprudence has routinely provided appropriate and adequate remedies to all persons, whether Navajo or not, from tortious conduct, breaches of contract and civil rights violations. The concept of justice runs deep within the culture of the Navajo people, and informs all government activity. In the Navajo way, individual rights and responsibilities, as well as the rights and responsibilities of the larger community, are considered in every dispute resolution.[15]

---

[14] 7 N.N.C. §§ 301 and 302. "The courts of the Navajo Nation this year will decide about 25,000 civil and criminal cases, and this figure does not include traffic offenses, juvenile matters, alternative traditional court proceedings, or appeals . . . Tribal courts today are infinitely more competent and better staffed than they were thirty or even fifteen years ago. Statement of Hon. William C. Canby, Jr., Judge, United States Court of Appeals for the Ninth Circuit, Senate Committee on Indian Affairs Oversight Hearing on Indian Tribal Justice Act, Aug. 2, 1995.

[15] Tso, *The Process of Decision Making in Tribal Courts*, 31 Ariz. L. Rev. 225 (1989); Lowery, *Developing a Tribal Common Law Jurisprudence: The Navajo Experience 1969-1992*, 18 Am. Indian L.

Indian nation courts have been thoroughly studied. They have been found to provide effective protection of individual civil rights.[16]

Rev. 379 (1994) (survey of Navajo Nation decisions); "Tribal Justice Systems," in D. Getches, C. Wilkinson & R. Williams, *Federal Indian Law* 493-550 (3d Ed. 1993) (survey of Indian nation courts with particular emphasis on the Navajo Nation judicial system).

[16] A five-year survey of Indian nation court civil rights cases, which reviewed reported Indian nation court decisions in the *Indian Law Reporter*, including several Navajo Nation decisions, concluded that

> The cases discussed in this memorandum make clear that tribal courts are protecting the rights of tribal members and upholding important principles of judicial review. The courts are attempting to meld tribal custom and norms with applicable legal doctrines. The decisions show impartiality and careful thought. Although the courts are fledgling and require greater resources to develop in their sophistication, it is clear that people in Indian country can safely turn to the courts when they feel their rights are threatened.

Marx, *Civil Rights in Indian Country: Tribal Court Decisions 1988-92* at p. 13 (Apr. 30, 1993) (unpublished manuscript; copy on file with the Office of the Chief Justice of the Navajo Nation Supreme Court).

The Indian Civil Rights Act, 25 U.S.C. §§ 1301 *et seq.*, adopted in 1968, is a congressional decision that Indian nation governments are competent to assure civil rights for all citizens, Indian and non-Indian alike.

In the 1970's the American Indian Policy Review Commission, a congressional body which did the most extensive survey of Indian policy in this century, studied Indian judicial systems. Its Final Report concluded that Indian nation courts are competent justice bodies – if only Congress would appropriate significant additional funds to operate them.

Although this discussion focuses on the legitimacy of the Navajo Nation's judicial system, many other Indian nations have evolved sophisticated and very competent courts, capable of adjudicating important interests of Indian and non-Indian alike. *See* Nell Jessup Newton, *Tribal Court Praxis: One Year in the Life of Twenty Indian Tribal Courts*, 22 Am. Indian L. Rev. 285 (1998). In *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 211 (1978), this Court stated, "We recognize that some Indian tribal court systems have become increasingly sophisticated and resemble in many respects their state counterparts."

Tribal courts are "capable of administering justice as well as it is done in many of our courts." Tribal Courts Act of 1991 and Report of the U.S. Commission on Civil Rights entitled "Indian Civil Rights Act": Hearing Before the Senate Select Committee on Indian Affairs, 102d Cong., 1st Sess. 9, at 9 (1991) (statement of Monroe G. McKay, Chief Judge, United States Court of Appeals for the Tenth Circuit).

One of the most important commentators who has concluded that Indian nation courts are effective guardians of justice is this Court's Justice Sandra Day

---

American Indian Policy Review Commission, *Final Report* 167 (1977).

Yet again, in 1990 the United States Civil Rights Commission revisited these issues. The Commission rejected federal review to guarantee civil rights and instead recommended that Congress address the issue of the ability of Indian nation courts to do their job by providing adequate funding to operate them. Congress responded by enacting the Indian Tribal Justice Act of December 3, 1993, P.L. 103-176, 107 Stat. 2004, 25 U.S.C. §§ 3601 *et seq.*

O'Connor. In 1996, in a speech before the annual Sovereignty Symposium, which was sponsored by the Oklahoma Supreme Court and the Indian nation courts of Oklahoma, Justice O'Connor praised the third judicial sovereign for effectively guaranteeing the rights of all and gave special mention of Indian lessons for restorative justice.[17] Justice O'Connor singled out Navajo peacemaking as an effective alternative to litigation.[18]

Nor is it surprising that the Navajo Nation judiciary is as evolved and sophisticated as it is, particularly since it is an absolutely separate and independent branch of government.[19]

---

[17] *Lessons from the Third Sovereign: Indian Tribal Courts*, delivered June 4, 1996. *See also*, National Indian Justice Center, *"Tribal Court Report"* (Sept. 1996) and "O'Connor Says Tribal Courts Offer Lesson," 12 *American Indian Report* 10 (July 1996).

[18] The President of the American Bar Association also recently praised traditional Navajo justice ways and recommended that American lawyers behave like Navajos. Ramo, "Lawyers as Peacemakers: Our Navajo Nation Peers Could Teach Us a Thing or Two about Conflict Resolution," *ABA Journal* 6 (Dec. 1995).

[19] The Navajo Tribal Council explicitly acknowledged this in its Resolution creating the 1985 Judicial Reform Act citing the requirement of a "strong and independent" judiciary being crucial to our sovereignty: "(9). If the Navajo Nation is to continue as a sovereign Nation and to move forward toward the reality of a three branch form of government. . . . Tribal sovereignty requires strong and independent Tribal courts to enforce and apply the law." Navajo Tribal Council Resolution CD-94-85 (Dec. 4, 1985); *see also* Navajo Tribal Council Resolution CD-68-89 (Dec. 15, 1989), Resolved Clause 6.

Not only is the general tripartite structure of the Navajo Nation modeled after the federal government, its judiciary has adopted many of the particular safeguards and procedures of the United States courts.[20]

Over 30 years ago, in 1967,[21] the Navajo Nation Council enacted the Navajo Nation Bill of Rights[22] guaranteeing the individual rights and liberties of all persons, whether Indian or not. [And this was not the first time that the Navajo Nation had so legislated: in 1960, for example, it guaranteed both due process and just compensation for interference with private property rights, formally legislating what had been in Navajo common law for decades].[23]

The Navajo Nation Bill of Rights is more expansive and protective of individual rights than either the Indian Civil Rights Act or the federal Bill of Rights. The Navajo Nation Bill of Rights extends to *all* persons, regardless of race or gender, freedom of speech and press and religious expression, the right to assemble peaceably and petition

---

[20] For example, the Navajo Nation Rules of Evidence, Civil, Criminal and Appellate Procedures all clearly are derived from, and are frequently virtually identical to, their federal counterparts.

[21] This anticipated the federal Indian Civil Rights Act, 25 U.S.C.A. §§ 1301 *et seq.* by one year.

[22] Navajo Tribal Council Resolution No. CO-63-67 (Oct. 9, 1967), *as amended*, 1 N.N.C. §§ 1-9.

[23] Navajo Tribal Council Resolution No. CJA-18-60 (Jan. 22, 1960), *as amended*, 16 N.N.C. §§ 1401-1403. *See also Dennison v. Tucson Gas and Electric Co.*, 1 Nav. L. Rep. 95 (Nav. Ct. App. 1974).

for governmental redress, the right to be free from unreasonable search and seizure, the right to just compensation in eminent domain, the right to keep and bear arms, the right to counsel and jury trial and to be free from self-incrimination, double jeopardy, cruel and unusual punishment, and excessive bail and fines. The Navajo Bill of Rights guarantees due process and equal protection to *all*, Indians or not.[24]

But this Navajo Nation Bill of Rights is not merely aspirational. It has been routinely and effectively enforced by our courts. For example, a quarter century ago, these rights were judicially enforced by the Navajo Nation Supreme Court against the Tribal Council, requiring both due process and just compensation.[25]

Again, in *Rough Rock Community School v. Navajo Nation*, No. SC-CV-06-94, slip op. at 6-7 (Nav. Sup. Ct. Mar. 14, 1996), the Navajo Supreme Court stated:

> The schools raise an issue which is very important to Navajo Nation economic development: Maintenance of a favorable climate to outside business. The schools cite our decisions which express concern for promoting economic development and prosperity, *e.g., TBI Contractors v. The Navajo Tribe of Indians*, [16 Indian L. Rptr. 6017 (Nav. Sup. Ct. 1988)]; *Largo v. Gregory & Cook, Inc.*, [22 Indian L. Rptr. 6040 (Nav. Sup. Ct. 1995)]; and *Reservation Business Services v. Albert*, [22 Indian L. Rptr. 6102 (Nav. Sup. Ct.

---

[24] *See, generally*, 1 N.N.C. §§ 3 *et seq.*

[25] *See* note 23, *supra*. In *Dennison* the Navajo Nation high court held that there can be no taking of private property without just compensation.

1995)]. The Navajo Nation courts are aware of the economic consequences of their decisions, and they have a reputation for protecting legitimate business interests. Frye, *Lender Recourse in Indian Country: A Navajo Case Study*, 21 N.M. L. Rev. 275 (1991). Today's decision does not mark a departure from that policy. Business entities and semi-public organizations, such as the community school districts here, have due process protections under the Navajo Nation Bill of Rights, 1 N.T.C. § 3.

3. The Navajo Nation's Reputation For Fairness Has Been Acknowledged By The Non-Indian Business Community.

This enduring commitment to judicial independence and integrity, along with the sophisticated cooperative commercial environment[26] found at the highest level of

---

[26] The Navajo Nation government fully recognizes that non-Indian companies provide a huge slice of the economic pie. In Fiscal Year 1998, more than ninety percent of its general fund revenues are derived from oil & gas, mining, etc., leases and rights-of-way. This situation is underscored since, unlike other Native American nations, gambling as a source of government revenue has twice been rejected by popular referenda in November 1994 and again in November 1997.

In the context of litigation and commercial disputes, the Navajo Nation has often cooperated to assure such companies a fair and impartial process of resolving any disputes. For example, in 1978, the Navajo Nation enacted its tax program, but thereafter granted amnesty to the construction industry for all tax periods prior to 1986, in order for a workable collection system to be developed based on industry comments. *See* Navajo Tribal Council Resolution No. CAP-22-86 (Apr. 25, 1986) and Navajo Tax Commission Resolution No. TAX-86-0036 (Sept. 26, 1986).

The Nation maintains a substantial amount in the Tax Administration Suspense Fund so that judgments favoring taxpayers may be promptly paid in full. During a 12-year dispute regarding 80 million dollars in taxes on a coal mining operation, the Navajo Nation entered into an agreement whereby the non-Indian company paid taxes into an escrow account pending resolution of the dispute. *See, e.g., In the Matter of BHP Minerals, Inc.*, Navajo Tax Commission Case No. 85-001, slip op. at p. 2 (Aug. 5, 1994). This tax dispute was ultimately settled amicably with the company.

the Navajo Nation government has been acknowledged by the business world at large.

In short, the Navajo Nation government and our judiciary is sophisticated, competent, professional and mature. It is certainly capable – and this must be made clear – to adjudicate whether or not it has jurisdiction, and then to determine whether to assume or defer it. The interest of the Navajo Nation in this case is only to have the first opportunity to determine these issues.

4. Navajo Nation Courts Have The Proven Capability To Analyze Complex Federal Issues Including Preemption.

"In all cases the Courts of the Navajo Nation shall apply any laws of the United States that may be applicable and any law or customs of the Navajo Nation not prohibited by applicable federal laws." 7 N.N.C. § 204(A).

The Navajo Nation's courts have followed this mandate. In *In Re Estate of Jumbo*, 17 Indian L. Rptr. 6042 (Nav.

Sup. Ct. 1990), the Navajo high court followed 7 N.N.C. § 204(A) and found that portions of the Federal Employee's Group Life Insurance Act, 5 U.S.C. §§ 8705(a), *et seq.* preempted and controlled the issues before it.

In *Pela v. Peabody Coal Company*, 17 Indian L. Rptr. 6132 (Nav. Sup. Ct. 1990), the Navajo Nation Supreme Court held:

> Congress has expressly reserved to the federal courts exclusive jurisdiction over most claims brought under ERISA. The reason for this is that Congress intended 'that the United States regulate the field of employee benefit plans eliminating the threat of conflicting and inconsistent local regulation'. *Pela*, at 7 citing *Marshal v. Chase Manhattan Bank*, 558 F.2d 680, 683 (2nd Cir. 1977). By granting federal courts exclusive jurisdiction, Congress wanted 'to create a body of federal substantive law regulating pension plans'. *Pela*, at 7, citing *Authier v. Ginsburg*, 757 F.2d, 796, 799, n. 5 (6th Cir. 1985). 'Thus, in those areas of ERISA under exclusive federal court jurisdiction, Congress undoubtedly wanted uniformity in enforcement and regulation, and therefore, the state and tribal courts have no jurisdiction in those areas.'
>
> Congress, however, did not require uniformity of enforcement and regulation under 29 U.S.C. § 1132(a)(1)(B). Pursuant to section 1132 (a)(1)(B), one may sue in a non-federal court, and have the court apply local law, to recover benefits, enforce benefits or clarify rights to future benefits, under a plan. Mr. Pela sued under this provision and we see no reason why a Navajo Nation court should not provide Mr. Pela or any party with relief using Navajo or non-Navajo law. We believe Congress has provided for use of non-federal courts and of local law to decide claims brought under section 1132 (a)(1)(B). *Pela*, at 6134.

In short, Navajo Nation courts are a competent and integral part of the federal system.

CONCLUSION

The failure to pursue removal is fatal to Petitioners' cause, them to now champion the negative implication of assumed congressional inaction that, Petitioners claim, divests Navajo Nation court jurisdiction.

This failure even to attempt removal was Petitioners' choice. Their proposed remedy for their failue is self-serving and would slash the rich tapestry of Indian law, woven by Congress and this Court for more than 150 years, which exhibits a primary thread: Indian nation jurisdiction exists except where expressly limited. Petitioners seek to stand this fundamental principle on its head and create *new* law: that jurisdiction is barred except

where expressly conferred. This is not and cannot be what Congress ever intended.

Respectfully submitted,

Navajo Nation Department of Justice
BRITT E. CLAPHAM, II
Acting Attorney General
STEVEN J. BLOXHAM,
Staff Attorney
LURALENE D. TAPAHE,
Staff Attorney
TERENCE M. GURLEY,*
Staff Attorney
P.O. Drawer 2010
Window Rock, Navajo Nation
(AZ) 86515
(520) 871-6347

Counsel of Record